OPINIONS

OF THE

CORPORATION COUNSEL AND ASSISTANTS

FROM

DECEMBER 31, 1908, TO APRIL 1, 1911.

COMPILED AND EDITED BY
EDWARD J. BRUNDAGE
CORPORATION COUNSEL

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INTRODUCTORY.

The Corporation Counsel's Office is very frequently requested to prepare written opinions which cover a multitude of questions concerning the law of municipal corporations.

While it is impossible, or at least impracticable, to publish all of the opinions prepared, it has, nevertheless, been deemed advisable to preserve in permanent form a portion of the opinions which I have considered will be of greatest use to the various departments of the city in general, and to this department in particular. I have, therefore, determined to have the opinions which follow compiled in book form.

I have personally supervised the preparation of this compilation, and take great pleasure at this time in expressing my appreciation of the careful and able manner in which the various Assistants Corporation Counsel have discussed the questions which have been submitted to them for their consideration.

Edward J. Brundage

Corporation Counsel.

CHICAGO, April 1, 1911.

OPINIONS

OF THE

CORPORATION COUNSEL AND ASSISTANTS

FROM

DECEMBER 31, 1908, TO APRIL 1, 1911.

JANUARY 2, 1909.

In re WHETHER CITY HAS ACCEPTED THE "T" ALLEY LYING SOUTH OF MARIANNA STREET IN BLOCK 4 OF FULLERTON'S 4TH ADDITION TO CHICAGO.

HON. BERNARD W. SNOW, Chairman Committee on Compensation.

Dear Sir:

Your communication of the 24th ult., to this department, requesting an opinion "as to whether the city has ever completely accepted the 'T' alley lying south of Marianna street, in Block 4 of Fullerton's 4th Addition to Chicago," with the accompanying ordinance, deeds and data, has been assigned me for answer.

Your inquiry involves simply the question of acceptance. Either the city has accepted the "T" alley in question, or it has not, so that *any* acceptance would, in law, be construed as a complete acceptance.

Upon a careful examination of the record of the entire subdivision of which Block 4 is a part, I find the necessary plat, certificate, and acknowledgment to constitute a statutory dedication, and I am fully satisfied that there was a proffered statutory dedication of the entire system of streets and alleys therein, including the "T" alley in question. A mere offer to dedicate, however, is not legally sufficient to effect a dedication. Acceptance is regarded as absolutely indispensable to its perfection.

In the case of *Russell v. C. & M. Electric Railway Company,* 205 Ill., 155, the Supreme Court said, on page 165 of opinion:

"To constitute a public highway by dedication, two things are necessary: There must be a dedication or offer to dedicate, and there must be an acceptance of such dedication by the proper public authorities."

Citing:

Fisk v. Town of Havana, 88 Ill., 208.

Littler v. City of Lincoln, 106 Ill., 353.

Jordan v. City of Chenoa, 166 Ill., 530.

Village of Augusta v. Tyner, 197 Ill., 242.

Willey v. People, 36 Ill. App., 609.

Until this has been done, the city has no interest whatever in the street or alley. In a very recent decision, our Supreme Court used this language:

"Until acceptance, they have no right in the streets and alleys designated on the plat."

Swedish E. C. v. Jackson, 229 Ill., 505.

Howes v. Village of Crete, 175 Ill., 348.

Jordan v. City of Chenoa, 166 Ill., 530.

That which constitutes an acceptance is as varied as the conditions and circumstances surrounding the land dedicated. It is a question of fact.

I am informed that the statutory dedication is questioned. Since the making and recording of the plat, as hereinbefore stated, lots and tracts have been sold in the subdivision with reference to the system of streets and alleys (including the one in question), designated upon said plat. Under such circumstances it is wholly immaterial whether the dedication was a common law or statutory one, or whether the proper municipal authorities had ever, in any manner, accepted the same, in so far as private rights may be affected, and as between the author of the plat or his privies in estate and those buying lots upon the faith of such plat or with reference thereto. For the law, under such circumstances, implies a covenant that such a designated street or alley shall be forever open for the purposes for which it was intended, free from any claim of the author of the plat or those claiming under him. In the case of *Corning & Company v. Woolner,* 206 Ill., 190, at 198 of opinion, the Court said:

"Whether the plat of Aquilla Moffat, in this case, could be held to be a good statutory plat or not, it was, at least, sufficient to constitute a common law plat and to manifest an intention of the author to dedicate to public use, the designated streets thereon, which is sufficient to estop such original owner and author of the plat and those claiming under him from denying or rescinding such dedication, WHETHER IT WAS SO ACCEPTED BY THE PUBLIC AUTHORITIES OF THE VILLAGE OR MUNICIPALITY, OR NOT."

The different effect of vacating a common law and statutory dedication is: In the former, the fee reverts to the abutting owner, while in the latter it reverts to the original dedicator. The writer, however, is quite satisfied that in the matter before us a statutory dedication exists. A statutory dedication can only be rescinded or withdrawn in the manner prescribed by the statute, if at all. In the case of the *Town of Lake View v. Le Bahn,* 120 Ill., 92, at page 100 of opinion, our Supreme Court stated the matter as follows:

"It is said, there was no acceptance by the town prior to 1873, when the owner fenced this particular strip of 33 feet, and has ever since held possession of the same, and that acceptance by town authorities is necessary prior to withdrawal of a tender of dedication. However this may be in the case of an ordinary common law dedication, we cannot recognize the doctrine as applying where there has been a statutory dedication. In such case the statute says the plat shall be deemed a sufficient conveyance to vest the fee simple in the streets in the municipality and we do not admit any power of withdrawing the dedication."

and in *Waugh v. Leach,* 28 Ill., 492, the same court said upon this subject:

"We certainly think a more unequivocal mode of dedication of streets could not be adopted than surveying and platting the ground and selling lots abutting upon the streets, even if the streets should not be used by the public. If they are not reclaimed by the original proprietor in some mode authorized by law, they remain public, open to the use of the public, whenever they may choose to appropriate them."

There is no question, I take it, but that some parts of the system of streets designated upon the plat have been used, im-

proved and otherwise shown to have been accepted by the municipality, and assuming that no such evidence exists of the acceptance of the particular alley in question, the query comes: Can the acceptance of part of the plat be construed as an acceptance of the whole? In the leading case of *Village of Lee v. Harris,* 206 Ill., 428, at page 436 of opinion, the court said:

"An acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless THE INTENTION TO LIMIT THE ACCEPTANCE IS SHOWN."

In the *Village of Augusta v. Tyner,* 197 Ill., 242, our Supreme Court said, at page 246 of opinion:

"It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the intention of the public authorities. An acceptance of some of the streets named in the plat will not constitute an acceptance of the whole, IF IT IS SHOWN THAT THERE WAS AN INTENTION TO LIMIT THE ACCEPTANCE."

Fortunately, the contrary intention is clearly shown in the matter now before us. Section 13, Paragraph 13, Chapter 115, entitled, "Recorders," Hurd's Revised Statutes of Illinois, 1908, with irrelevant parts omitted, reads:

"It shall be *unlawful* for any recorder to record any map, plat or subdivision of land situated in any incorporated city, etc., until the same shall have been *approved* by the legislative authority of the city, etc., in which such land may be situated, or, by some city, etc., officer for that purpose to be designated by resolution or ordinance of said legislative authority, etc."

Then follows the penalty for violation. That the city council might have the necessary power to put the above into effect, it is provided in its charter as follows:

"The city council, etc., shall have power to provide, by ordinance, that any map, plat, or subdivision of any block, lot, subdivision or part thereof, or any piece or parcel of land, shall be submitted to the city council, etc., OR TO SOME OFFICER TO BE DESIGNATED BY SUCH COUNCIL, etc., for their or his approval; AND IN SUCH CASES, NO SUCH MAP, PLAT OR SUBDIVISION SHALL BE *ENTITLED TO*

RECORD in the proper county, or have ANY VALIDITY UNTIL IT SHALL HAVE BEEN SO APPROVED."

In strict compliance with these statutory provisions, the City Council has provided, by ordinance, for an officer known as "Examiner of Subdivisions," whose duty, among other things, is to pass upon all such maps, plats, etc., and if correct and acceptable, mark them with his approval. The plat in the case before us is endorsed:

"Approved, August 6th, 1890.

H. J. JONES,
Examiner of Subdivisions."

I am of the opinion, that the "T" alley has been accepted by the city, but that local conditions have not required the municipality to improve or assume dominion over the alley in question in any conspicuous manner. It, therefore, follows that I am of the further opinion that your inclusion of this alley in those for which you ask compensation upon their vacation, is just, proper and right, and I very respectfully recommend your Committee's adherence, in this particular, to the ordinance as referred to you.

Respectfully submitted,
GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

JANUARY 13, 1908.

In re EFFECT OF DEED OF VACATION OF MATILDA G. CARSON'S SUBDIVISION OF PART OF N. W. ¼ OF N. W. ¼ OF SECTION 12-39-13, RECORDED DECEMBER, 7, 1908.

JOHN D. RILEY, ESQ., Superintendent of Maps.

Dear Sir:

I am in receipt of your letter of January 7th, asking for advice as to the validity of a deed of vacation filed in the Recorder's Office December 7, 1908, as document No. 4,298,912, and purporting to vacate the whole of Matilda G. Carson's Sub-

division of part of the Northwest quarter of the Northwest quarter of Section 12, Township 39 North, Range 13, East of the Third Principal Meridian.

The copy of this instrument furnished by you shows upon its face that it is executed by all the owners of lots in the plat and it, therefore, comes within the operation of Section 6 of the Act of 1874, relating to plats. This Section provides for the vacation of the whole of any plat in the following language:

"6. OF THE WHOLE PLAT.] Sec. 6. Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, executed, acknowledged or proved, and recorded in like manner as deeds of land; which declaration being duly recorded, shall operate to destroy the force and effect of the recording of the plat so vacated, and *to divest all public rights in the streets, alleys and public grounds and all dedications* laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing. (L. 1847, p. 166, Sec. 1.)"

No objection is seen to the form of the vacation instrument in question and it is, therefore, believed to be operative upon all lots in the subdivision and also upon all streets and alleys, the dedication of which has never been accepted by the city. Your copy of the plat of Matilda G. Carson's Subdivision shows, however, that the same includes portions of North Albany avenue and West Ohio street and indicates that since the recording of the plat of this subdivision, April 28, 1898, the two streets named were paved, in 1899 and 1904, respectively, and that sewers and water mains have also been laid therein. The dedication of these streets has, therefore, been accepted by the city and we suppose the point of your inquiry to be, whether the owners of lots can at this time by their deed of vacation put an end to rights previously acquired by the public.

To determine correctly the effect of the deed under the statute, it is proper to examine the language not only of Section 6 above quoted, but of the whole statute, and in Section 3 we find the following provision:

"3. DEDICATION—EFFECT OF.] Sec. 3. The ac-

knowledgment and recording of such plat shall be held in law and equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public. . . . And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended. (R. S., 1845, p. 115, Sec. 21. Town of Princeton v. Templeton et al., 71 Ill., 68; City of Chicago v. Wright, 69 Ill., 318; Village of Princeville v. Auten et al., 77 Ill., 325; C. R. I. & P. R. R. Co. v. City of Joliet, 79 Ill., 25.)

In *Littler v. Lincoln*, 106 Ill., 353, it was held for the first time that an acceptance by the proper authorities is required before the legal title to a platted street will vest in the municipality; but when this condition has been fulfilled, there are many decisions to the effect that the municipality holds the title in fee simple in trust for the public for street purposes.

Where this result is accomplished, it is impossible to suppose that the legislature intended, through Section 6, to put it in the power of individuals, by vacating the plat, to deprive the public of the use and title to a street. If that were true, it would be possible for the owner or owners of lots in any subdivision to reclaim the streets platted therein, irrespective of the amount spent in improving them or of their use as thoroughfares. For this reason we think Section 6 means that a deed of vacation shall operate to divest public rights in the *dedication* of streets, alleys and public grounds, that is, to destroy the right of the public through its authorized representative to accept such dedications, but not to interfere with streets to which the title of the municipality has been perfected.

In the recent Supreme Court decision of *Sturges v. City of Chicago,* filed December 15, 1908, it was said:

"When the literal enforcement of a statute will result in inconvenience and great hardship and lead to consequences which are absurd, the courts will presume no such consequences were intended and adopt a construction which is, in its consequences, in accordance with reason and which will promote the ends of justice and avoid the absurdity."

Citing authorities.

And in *People v. Harrison,* 191 Ill., 257, it was said, page 266:

"A thing within the intention is regarded as within the statute though not within the letter, and a *thing within the letter is not within the statute, unless within the intention.*"

We believe that the intention and policy of the legislature is more adequately expressed in Section 7 of the same statute relating to the vacation of a part of a plat, which is as follows:

"7. OF PART OF PLAT.] Sec. 7. Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: PROVIDED, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat; And, provided, further, *that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law.* (L. 1847, p. 167, Sec. 3.)"

Certainly there seems to be no reason why a "public highway laid out according to law" should be exempt from the operation of a deed vacating part of a plat and subject to the operation of a deed vacating the whole plat. Nor does the court appear to distinguish between these situations in *Littler v. Lincoln,* supra, where it is said, page 369:

"Where the plat, if accepted as a conveyance, imposes the burden on the city authorities to open, improve and keep in repair the streets, the acceptance can not be assumed from the mere proof of execution of the plat. . . . *and it is upon this doctrine that Sections 6 and 7 of Chapter 109 proceed.* Where no private rights in the lots or blocks are involved, *and no public highway has been laid out according to law,* no one has an interest which can be adversely affected by the vacation."

We, therefore, think that the deed of vacation filed December 7, 1908, is without effect as to those portions of North Albany avenue and West Ohio street within the limits of the plat recorded by Matilda G. Carson, April 28, 1898.

Aside from the above considerations, it is noted that an ordinance was passed November 5, 1888, for the opening of North Albany avenue from West Ohio street to Chicago avenue, and that an order of possession, the final step in a condemnation

proceeding, was entered January 30, 1897. Since a plat, in order to conform to the statute and be a proper subject for a deed of vacation, must be executed by the owner, it is evident that the plat of Matilda G. Carson's Subdivision, recorded in April, 1898, was a nullity as to North Albany avenue and that this street could not, therefore, be affected by the deed of vacation.

While the deed is, in our opinion, ineffectual as to North Albany avenue and West Ohio street, no reason is perceived for disregarding its effect as to the balance of the plat. That is, the deed will still operate to vacate the subdivision of lots and of such streets and alleys in which the dedicator still retains her interest through the failure of the city to show its acceptance. So any deed purporting to convey more than the grantor owns will be regarded as void as to that part of the premises described in which the grantor has no interest, and good as to the balance. (16 Cent. Dig., 507.)

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JANUARY 18, 1909.

In re EXISTENCE OF PUBLIC HIGHWAY BETWEEN 115TH AND 123RD STREETS.

HON. MILTON J. FOREMAN, Chairman, Local Transportation Committee.

Dear Sir:

Your committee during its consideration of a pending ordinance granting certain rights to the Kensington & Eastern Railroad has requested the Corporation Counsel to give an opinion, based upon the information presented to the committee, as to whether or not the said railroad is occupying a public street on its proposed right of way between 115th and 123rd streets. Pursuant to the direction of the Corporation Counsel I have investigated this question and desire to advise you thereon as follows:

The contentions of the various claims are based on different premises, Mr. Van Vlissingen asserting that the city has acquired title by dedication (C P., Dec. 21, p. 34), Mr. Lee that title has been acquired by user (p. 41, same record).

In view of this situation and in order to formulate a defendable conclusion it is advisable to summarize the records produced before the committee, the statements offered and all the legal methods by which highways may be established.

THE RECORDS.

It is not controverted that a public highway existed from a point where the Michigan Central Railway crosses the center line of Section 34, south of 123rd street, and extending to the Calumet river. An act was passed by the Legislature in February, 1841, to establish and maintain a toll bridge across the river at the south-most point of this road, but regardless of the legal status of the highway in 1861, the highway commissioners of the town of Worth attempted to lay out the road in the manner provided by the statutes in force at that time.

Among the records in the custody of the town clerk of the town of Worth I found the following:

A petition for a road commencing at the north side of the Calumet river on the middle line of the center of Section 34 in Township 37, Range 14, east, then north until it crosses the Michigan Central Railroad, and thence in a northwesterly direction following the Michigan Central and Illinois Central Railroads to a line running east through the center of Section 22, thence east to the Calumet lake;

also a highway notice signed by three commissioners of highways and an order that the road be located and laid out, *not signed by the commissioners.*

The records fail to show that subsequent to the time above mentioned any statutory dedication of the land involved by the owner was made, nor do any of the maps of the town of Worth, Hyde Park or the City of Chicago indicate that there was a highway between the points described above.

STATEMENTS OF CLAIMANTS.

A gentleman believed to be Mr. Charles Giegenhagen asserted that there was a road between these points *170 feet wide* (C. P., December 19, p. 23).

Mr. Lee asserted the existence of a road between the points in question since 1880. His father told him of it. That it was fenced all, or nearly all, the way between 115th and 123rd streets; approximately 66 feet wide (C. P., December 21, p. 21).

Mr. Van Vlissingen asserted that he had talked to many persons, including a Mr. Rexford, who recollected the work in question. That Rexford had said that in '62 or '63 it was fenced in (C. P., December 19, p. 23).

Mr. Lee—The street was in use since 1885. Don't recall fence. Center portion used as a drive (p. 25). It was thrown up and crowned over—don't know about ditch on side (p. 26, C. P., December 21).

John Gohring deposes and says that the road was used continuously for more than forty-four years—was fenced in during the early days.

George R. Hellstrom says that—

"As far as sixty-six feet is concerned, I have lived there for twenty-one years and have not seen much of the street. There were probably certain days in the year when you could possibly work your way through there with a buggy or wagon, but there is nothing like a street there." (C. P., Jan. 6, p. 23.)

Statements were also made before the sub-committee of a nature similar to the above.

METHODS OF ESTABLISHING ROADS.

Section 1 of an act in regard to roads and bridges, etc. (Hurd's Rev. Stat., 1908), provides:

"That all roads in this state which have been laid out in pursuance of any law of this state or of the territory of Illinois, or which have been established by dedication or used by the public as a highway for 15 years, and which have not been vacated in pursuance of law, are hereby declared to be public highways."

The law in relation to the laying out of new roads, in force

during 1861, is found in Sections 218 to 248, inclusive, Vol. 2, Purp. Statutes, Laws of Illinois, 1856, pages 1162-1167, inclusive:

Sec. 218 provides, in substance, that when a new road is desired it shall be petitioned for by not less than twelve legal voters, residing within three miles of the road, sought to be laid out.

Sec. 219 provides that upon the receipt of such petition, the commissioners of highways shall cause a copy of the petition to be posted in three of the most public places of the town, twenty days before any action shall be had in reference to said petition.

Sec. 220 provides that when the commissioners have complied with the two preceding sections, they shall, or a majority of them, within ten days after the expiration of said twenty days, personally examine the proposed road, and hear reasons for or against the laying out of the same, and if, in their opinion, the new road shall be laid out, they shall grant the prayer of the petition, etc.

Sec. 221 provides that, when they shall determine to lay out the new road, they shall cause a survey to be made by a competent surveyor, who shall make a report to them of the survey, accompanied with a plat particularly describing the road by metes and bounds, courses and distances, and also the land over which the said road passes; that the commissioners shall incorporate such report and survey accompanied by plat, in an order *"to be signed by them,"* declaring the road to be a public highway.

Sec. 223 provides that damages sustained by reason of the laying out of the new road shall be ascertained by agreement of the owners and the commissioners, and unless such agreement be made, or the owners of the land shall *"in writing, release all claim of damages,"* the same shall be ascertained in the manner thereafter prescribed.

The only other way in which this road might have been acquired is by dedication or prescription.

Statutory dedication involves the filing of a plat by the owner and the following out of the legal provisisions with exactitude. A common law dedication may arise through a defect in such statutory proceedings.

Dedication cannot be presumed from the fact that the owner of vacant and unenclosed land, being put to no present use, makes no dissent to the public traveling over it in a certain route. In order to presume dedication there must be some positive, affirmative action on the part of the owner—mere permissive use is totally insufficient to establish a dedication.

In order to substantiate the claim that a strip of land *by prescription* has become converted into a public street, it devolves upon the city to establish by satisfactory proof that it has been in the possession of the premises for the full statutory period; that its possession was *hostile or adverse,* actual, visible, notorious and exclusive, continuous and under a claim of color of title.

Rose v. City of Farmington, 196 Ill., 226.

CONCLUSIONS.

The proceedings on the part of the highway commissioners were void because of the omission of their signatures to the order referred to above declaring the road to be a public highway as well as on account of their failure to assess the damages as provided by law. On this subject the statute is imperative.

Commissioners of Highways v. Durham, 43 Ill., 86-91.

It is safe to assume that prior to '61 some contest concerning the existence or non-existence of the road must have arisen from the fact that at that time fifteen citizens living within three miles of the site petitioned that the road be established by law.

No record has been discovered which shows or tends to show that any dedication of the land in question for road purposes was made, and from the known facts, I cannot say that if there were a dedication, of whatever kind, there was any acceptance.

"In order to constitute a dedication at common law of lands for a public street it must be made to clearly and unequivocally appear that the land owner intended to donate his land to the public for a public street and that the public have accepted the same for such purpose. City of Chicago v. C. R. I. & P. Ry. Co., 152 Ill., 561."

Town of Wheatfield v. Grundman, 164 Ill., 250.

It, therefore, follows that the road, if it exists at all, exists

by prescription. From the declarations of those who appeared before the sub-Committee and your Committee, it is apparent that the territory within which lay the strip of land in question was open country; that for a time a roadway of uncertain width and uncertain course was fenced in for a portion of its length, but nothing, however, was adduced by the claimants to indicate any acceptance of the road or that the use thereof was adverse.

On the question of adverse user, the chairman of the sub-Committee concedes the correctness of the above conclusion. He reported:

"There was nothing shown before the sub-Committee that the use of the road was adverse to the claim of any other owner or alleged owner in that territory." (C. P., December 21, p. 33.)

The entire contention of claimants is founded on the assumption that a road may be established by passive conduct of the owner.

Mr. Lee.—"It seems to me if there is anything that tends to show that a street is a street it is by the acquiescence of the property owners." (C. P., December 21, p. 25.)

The courts of our State unanimously dissent from this doctrine.

"There must be something more than mere travel by the public over unenclosed lands in order to establish a highway by prescription since such use is presumed to be permissive and not adverse."

O'Connell v. C. T. R. R. Co., 184 Ill., 308.

"In order to establish a public highway, by prescription, over unenclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right. In the first place, it is unreasonable to suppose that road authorities would claim, or a property holder suspect, that a public highway was to be located on the tortuous line of the road in question. The little work done on it in all the years that it has been traveled cannot be said to amount to notice that it was being used under a claim of public

right. The work did not amount to an improvement of a public highway. It was rather for the temporary purposes of travel."

Town of Brushy Mound v. McClintock, 150 Ill., 133.

On or two further pertinent principles of law may be properly cited in this connection.

"Our experience teaches that land has been used by the public in different parts of the State, for purposes of travel, when it was vacant and unoccupied, the owner having no occasion to occupy it exclusively. It would be unjust to say that the public, by this acquiescence, under such circumstances, acquired a title to a part of the land."

Kyle v. Town of Logan, 87 Ill., 64-67.

"While so much land lying in common in this country remains free to public uses and travel until circumstances induce owners to enclose, we can deduce no strength of inference or conclusion from mere travel across it by the public without objection from the owner. It is neither the temper, disposition, fashion nor habit of the people, or custom of the country, to object to community enjoying such privilege until owners wish to enclose."

City of Ottawa v. Yentzer, 160 Ill., 509-516.

It is essential to a way by prescription that the use be under such circumstances as to indicate that it was claimed as a right and was not regarded by the parties as a privilege or license.

C. B. & Q. R. R. Co. v. Ives, 202 Ill., 69.

A consideration of claimants' statements shows them, when reduced to their last analysis, to be uncertain, conflicting, largely hearsay and in part the conclusions of the speakers. The facts and legal elements necessary to the establishment of a highway were neither proffered nor suggested, and from what transpired before the committee and sub-committee it appears that there was a user of the discussed strip of ground, but I am not convinced that such user amounted to more than a mere license to those who traveled this route.

I am, therefore, upon an assiduous examination of the statements of those interested and upon an inspection of copies of all records submitted to your committee, impelled to the opinion that from the information at hand it is a matter of grave doubt as to whether or not the city could successfully

maintain that a public highway exists upon the proposed right of way of the Kensington & Eastern Railroad, between 115th and 123rd Streets.

It is certain that if a test case were made the proof would have to be of a different and more clear and convincing nature than the asseverations considered herein.

I believe it proper to add that this department would not feel warranted in giving an opinion of this kind based upon information so meagre in quantity and so unsatisfactory in quality were it not for the fact that no citizen who differs with the conclusions expressed will be foreclosed from testing its accuracy by proper legal procedure if action be instituted in apt time. The courts will be open to him even though this committee and the City Council passes the proposed ordinance.

People ex rel. v. Harris, 203 Ill., 272.
C. B. & Q. R. R. Co. v. City of Quincy, 136 Ill., 563-571.
Legare v. City of Chicago, 139 Ill., 46.

Respectfully submitted,
HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re ALLEY NORTH OF DIVERSEY BOULEVARD AND WEST OF CLYBOURN AVENUE.

JANUARY 20, 1909.

MR. H. V. MCGURREN, Chief Clerk, Bureau of Compensation.
Dear Sir:

We have your letter regarding the 16 foot alley north of Diversey boulevard and west of Clybourn avenue, which you say the International Harvester Company claims.

We find that this alley was dedicated by a plat recorded July 18, 1883; that it has been open for a number of years; that at one time there were fences on both sides of a part of the alley; that there is a fence upon the northeast side of the alley. You say that the city collected garbage and ashes in the alley at the time the Company took possession. We are advised that

the curb on the north side of Diversey boulevard has a return for this alley.

You say that you have personal knowledge that the alley has been used by occupants of the houses fronting on Clybourn avenue.

We invited Mr. J. M. Blazer, attorney for the International Harvester Company, to bring before us such information as he had but he has not brought anything of any value.

After careful consideration of the matter, we conclude that the alley has been accepted by the city and that the Company's efforts to vacate the same are futile, so that the alley still exists and it is within the right and power of the city to keep the alley open for use.

Yours very truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved.
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re SOUTH SIDE ELEVATED RAILROAD—THROUGH TRAINS FROM ENGLEWOOD, NORMAL PARK AND KENWOOD BRANCHES TO THE UNION LOOP DISTRICT.

JANUARY 27, 1909.

M. B. HERELEY, ESQ., Traction Expert, Department of Local Transportation.

Dear Sir:

Your letter of January 20 on the above subject, addressed to the Corporation Counsel, has by his direction been referred to me. You ask whether or not the City of Chicago can compel the South Side Elevated Railroad Company to run through trains from Englewood, Normal Park and Kenwood direct to the Loop District, and also compel the Company to run such trains from the Loop District direct to these various points.

Any specific power of control and regulation which the city has must be found either in the ordinances under which the South Side Elevated Railroad Company is operating, or in the city charter.

The ordinance giving authority to the Chicago Junction Railroad Company to construct the Kenwood and Stock Yards branches, passed March 16, 1903, provides that these branches must be operated by the South Side Elevated Railroad Company as a part and parcel of its road and at the same rate of fare. The ordinance under which the Englewood branch of the South Side Elevated Railroad Company is operated was passed March 16, 1903. This ordinance provides that while the Englewood branch was to be constructed by the Englewood Elevated Railroad Company, it should from its completion be permanently operated by the South Side Elevated Railroad Company by lease, consolidation or other arrangement between the two companies, as a part and parcel of the road of the South Side Elevated Railroad Company.

All of the ordinances under which the South Side Company is operating provide for a five-cent fare for a "continuous trip" within the city limits, upon the elevated railroad now or hereafter operated by the South Side Company. It may be urged that the words "continuous trip" in these ordinances mean a trip on one car without necessitating a transfer from one car to another. The Supreme Court of this state has not passed directly upon what is meant by the words "continuous trip," but the general rule is that a continuous trip means a trip from one point to another without stopping at intermediate points. The words "continuous trip" do not refer to a continuous passage of a railroad train or car, but a continuous passage of the passenger.

Walker v. Wabash, St. L. & P. Ry. Co., 15 Mo. App., 333.

Hampe v. Traction Co., 165 Pa., 468.

Garrison v. The United Railways & Electric Co., 97 Mo., 347.

In *People v. Suburban R. R. Co.*, 178 Ill., 594, a writ of mandamus was issued ordering and directing the Suburban Railroad Company to sell tickets for a "continuous ride" from River Forest over the lines of the Suburban Railroad Company and the Lake Street Elevated Railroad Company to the Union Loop in Chicago, at a rate of twelve such continuous rides for one dollar. While the question of what a "continuous ride" means was not raised in the case, it clearly appeared that the ordinance on the provisions of which the Supreme Court justified the issu-

ance of the writ, provided for a transfer of the passengers from the cars of the Suburban Road to the cars of the Lake Street Road. The company could give a "continuous ride" from River Forest to Chicago, although it required passengers to transfer from a Suburban to a Lake Street car.

There are no other provisions in the ordinances which can be considered as bearing on the question here being considered. I am of the opinion, therefore, that while the ordinances require the Company to transport passengers from the termini of its different branches to the Loop District without a stop-over, on the payment of a five cent fare, they do not require the Company to carry the passengers in the same car throughout the entire trip. Under reasonable regulations passengers, under the terms of the ordinances, may be required to transfer from a car on a branch line to a car on the main line.

The power of control and regulation of the South Side Company which the city has by its charter is two-fold: First, there is such power as is delegated to the city because of the fact that it has plenary control over the public streets, and, second, such power as is given in Clause 42, Section 1, Article V, of the Cities & Villages Act, which grants to the city the power to regulate street railway companies and prescribe their compensation.

Chicago Union Traction Co. v. City of Chicago, 199 Ill., 484.

A part of the line of the South Side Elevated Railroad Company is located upon a public alley and, of course, other parts at street intersections are located on public streets, alleys and highways within the city. Insofar as the line of the South Side Elevated Railroad Company is on the public streets, the city has the power of police regulation under its plenary power to regulate traffic on the public highways in the city.

Such power over street railway companies as the city has by virtue of its control of the streets is confined to the enforcement of police regulations to prevent improper use of the streets by transportation companies, to prevent congestion, to enforce rules of the road, to facilitate traffic on the streets, and similar regulations. It has never been successfully invoked as authority to regulate the *operation* of street railway companies except indirectly as the regulations of the kind above mentioned affect

such operation. In my opinion it can not be successfully invoked here as authority for requiring the direct running of trains from the termini of the various branches to the Loop District and vice versa.

While, as has been said, only a part of the South Side Elevated Railroad Company is on the public highway of the city, I am of the opinion that for the purpose of considering the extent of the city's power to regulate the South Side Company it would be considered a street railroad.

Doane v. The Lake Street Elevated R. R. Co., 165 Ill., 510.

Bond v. The Pennsylvania R. R. Co., 171 Ill., 508.

The South Side Company is organized as a commercial railroad corporation, and for the purpose of taxation the Lake Street Company (now Chicago & Oak Park) has been considered by the Supreme Court as a commercial railroad corporation.

Knopf v. Lake Street Elevated R. R. Co., 197 Ill., 212.

As far as the control of the service of the South Side Elevated Railroad by the city is concerned, I am of the opinion that the Supreme Court would hold that the city has all the power which it has generally over commercial railroads located within the city, and in addition all the powers which it has over street railways. The question is: How far do these powers extend in the matter of regulating the service of the South Side Company?

All railroads, whether street railroads or commercial railroads, are affected with a public interest. They are not private but public or quasi-public enterprises, and over such enterprises or businesses it is well settled that the state has the largest measure of control. The state may regulate the service rendered to the public by such corporations. It may fix their compensation, prevent discrimination between individuals and between localities, and in general may insist that each one of such companies shall, as far as their duly authorized facilities permit, give the utmost public service, and that they shall not adopt business policies which are inconsistent with their public duties.

The state could, therefore, delegate to the city directly the power to compel the South Side Elevated Railroad Company to carry its passengers over its entire road and branches without transferring them. In my opinion, however, the state has given

no such specific grant to the city, and if there is such power it must be found under the police power of the city as expressed particularly in Clause 42 of Section 1, Article V, of the Cities & Villages Act. The power granted by Clause 42, considered in connection with the obligations imposed on the Company by virtue of the fact that its business is affected with a public interest, in my opinion, gives to the city the right of regulating the service of the South Side Elevated Railroad Company to this extent: the company must give to its patrons the best service which its duly authorized facilities and the amount of its patronage justify. The Company can not be compelled to do business without profit or at a loss; it can not be compelled to adopt unreasonable methods of routing its trains in view of all the circumstances surrounding its business—the construction and location of the road, the manner of operating its trains, the total amount of its patronage and the distribution of its patronage throughout the different territory which the road serves.

If, considering, first, the needs, convenience and comfort of *all* the patrons of the South Side road and, second, the needs, convenience and comfort of the patrons of any particular branch, it appears that on the whole the carrying of passengers on that branch direct to the Loop District without a transfer from one car to another will promote the convenience and comfort of such passengers without adversely affecting in a material degree the service given other passengers, and if it appears that all the conditions under which the entire road is operated, considered from the standpoint of good railroad operation, justify such carrying of passengers on the branch line, then a routing of cars which will bring about this result may, in my opinion, be compelled by the city. But a strong showing as to the public needs and as to the ability of the Company to give the service must first be made. On a doubtful showing, in my opinion, no court would order such a routing of cars, in the absence of a specific power granted to the city to compel such routing. If all the conditions as they actually exist now do not require the routing of trains in such a way as to carry passengers from the several branches to the Loop District without a transfer, then I am of the opinion that the city has no power to compel such routing.

The general principle is that as to matters which are not

governed directly by the contract which the public service corporation has made with the municipality relating to the ordinary conduct of its business, and matters not subject to the police power of the city or state, the corporation has the right to manage and control its own affairs, provided only that its affairs are so conducted as, under all circumstances of the case, best to subserve the public interest. In considering the question of whether or not the South Side Elevated Railroad Company is fulfilling its obligations to the public you would have to consider not only the demands made upon the road by the people who patronize the various branches, but also the demands of all the public who patronize the road, and in order to say that the city has a right to compel the re-routing of trains it must clearly appear that considering the interests of all the patrons of the road the Company is not now so routing its trains as best to subserve the interest of all its patrons, and that it is not fulfilling its duties to the public by giving adequate service—that is to say, the best service that its actual facilities, or the facilities which it is authorized to have, and its patronage will permit.

The original ordinance of the Chicago & South Side Rapid Transit Railroad Company, under which the present South Side Company claims to operate, provides that "The city of Chicago reserves to itself the right of regulating by ordinance the *rate of speed* at which said trains shall be run, and also the right to *regulate the heating of cars and depots,* and also the right to impose such regulations as the council may deem necessary for the *protection* and *safety* of the public."

Chicago & South Side R. T. R. R. Co.: Ordinance, March 26, 1888, Sec. 8.

There is a provision also in the Englewood ordinance (Section 20) which provides that nothing in the ordinance shall operate as a waiver or surrender of the police powers of the city. This last provision is, of course, without special significance, for the reason that it is elementary that the city has no power to waive or surrender its police powers.

In my opinion the city has in any case power to compel the South Side Elevated Railroad Company to provide a safe, comfortable and convenient place of transfer, if it does transfer passengers. The city may compel the heating, lighting, ven-

tilating and proper maintenance of transfer stations. It may require the Company to make close connections at transfer points and to make and enforce all necessary regulations for the protection and safety of the public at these points.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved.

EDWARD J. BRUNDAGE,

Corporation Counsel.

In re STATUS OF HOLDOVERS IN LIBRARY SERVICE.

APRIL 5, 1909.

DR. GRAHAM TAYLOR, Chairman, Committee on Re-Classification of the Public Library Service, Chicago.

Dear Sir:

The Corporation Counsel has referred to me for reply your letter of this date requesting an opinion as to the status of holdovers in the library service. You also ask the question: "Is their continuance in the service dependent solely upon their reappointment by the Library Board?"

The term "holdover" as used in connection with a public office or position which has been brought within the operation of the Civil Service Law is commonly used to designate an officer or employe who was appointed prior to the taking effect of the Civil Service Law (which in the case of officers or employes of the City of Chicago was April 2, 1895, the date of its adoption), and who has continued to occupy and perform the duties of such office or position without further authority than the original appointment.

Section 3 of the City Civil Service Act provides that the Civil Service Commissioners "shall classify all the offices and places of employment in such city with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

The above section applies to all persons connected with the Library Board, except the members of the Board of Directors, who under Section 11 above referred to, are exempt from the operation of the Civil Service Law, as their appointment is made subject to confirmation by the City Council.

By Section 6 of the Act it is provided that all applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens, etc.

All power of appointment which the Library Board had prior to the adoption of the Civil Service Law by the City of Chicago was taken from that board when the Civil Service Law was adopted, and your board now possesses no power of appointment or reappointment except such as it is authorized to exercise under the provisions of the Civil Service Law and which can only be applied in the cases of persons who have complied with the requirements of the Civil Service Law as to examination and who have been regularly certified by the Civil Service Commission from an eligible list created under the provisions of the Civil Service Act.

It is my opinion that any action on the part of the Library Board which would disturb or in any manner change the status of a "holdover," such as transferring such holdover to another position or assigning him to other duties than those of the position to which he was originally appointed, would constitute a violation of the provisions of Section 3 above quoted.

It would seem, therefore, that the only method by which holdovers occupying positions in the library service can be continued in service without contravention of the provisions of the Civil Service Act is by being left undisturbed in the positions to which they were appointed.

Respectfully yours,

CLYDE L. DAY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

In re AUTHORITY OF CITY COUNCIL TO COMPEL THE GAS COMPANY TO LAY STUB ENDS IN STREETS READY FOR PAVING.

APRIL 30, 1909.

HON. JAMES F. CLANCY, Alderman, Twenty-eighth Ward.

Dear Sir:

The Corporation Counsel has referred to me your request for an opinion as to the authority of the City Council to pass an ordinance compelling corporations furnishing gas to lay stub ends for each 25-foot lot in streets that are ready for paving.

In response to this request I beg to state that the City Council has no power to pass a mandatory ordinance compelling the People's Gas Light & Coke Company (to which you no doubt refer) to put in such stub ends, for the reason that such an ordinance would in certain instances necessitate the expenditure of large sums of money in streets where there would be no demand for gas, and the gas company could not receive a reasonable return for the money thus expended. Such an ordinance could not be sustained as a reasonable exercise of the city's police power.

The City Charter, however, provides that the City Council shall have power to regulate the use of streets, and to regulate the openings therein for the laying of gas or water mains and pipes and the building and repairing of sewers, tunnels and drains, and erecting gas lights.

By virtue of the above powers the City Council has the right to refuse to issue permits to the gas company for opening any pavement to lay new pipes or stub ends. It would, therefore, be proper for the City Council to pass an ordinance providing that all persons or corporations desiring to lay gas mains or to make any connections therewith, or to lay electric wires in streets which are about to be paved, shall do so within thirty days after receiving notice from the Commissioner of Public Works or City Electrician.

By this method the City Council could no doubt accomplish indirectly what it can not do directly. The principal difficulty with this situation would be that if the gas company did not put in the stub ends as directed, persons living on the street who desired to obtain gas would be deprived from getting it unless

the Commissioner of Public Works would consent to the opening of the street.

Truly yours,
GEORGE E. DIERSSEN,
Assistant Corporation Counsel.

Approved.
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re POWER OF CITY TO PREVENT DUMPING IN LAKE MICHIGAN.

MAY 28, 1909.

HENRY B. HEMENWAY, M. D., 1243 Chicago Avenue, Evanston, Illinois.

Dear Sir:

I have your yetter of yesterday, and in reply, beg to say:

I have been over the entire subject, and I am of the opinion that the city has no power to prevent dumping by government contractors who dump by direction and authority of the Secretary of War. In other words, I agree that the opinion of Attorney General Griggs, which has been discussed by us and which is found in 22 Opinions of Attorneys General, 646, correctly states the law as it now stands.

As to all other persons, however, except the agents of the government, I am of the opinion that the City of Chicago now has the power to prevent dumping in Lake Michigan within ten miles of the city limits.

Section 2 of Article 10 of the Act of April 10, 1872, provides that—

"The jurisdiction of the city or village to prevent or punish any pollution or injury to the stream or source of water or to such water works, shall extend five miles beyond its corporate limits or so far as such water works may extend."

Section 3 of the Act of April 15, 1873, extends the jurisdiction of the city by providing that—

"The jurisdiction of such city, town or village to prevent or punish any pollution or injury to the stream or source of water for the supply of such water works shall extend ten miles beyond the corporate limits."

It is true that the United States statutes provide that dumping by others than government contractors may be permitted by the Secretary of War when such dumping will not interfere with navigation, but such permission does not confer an absolute right to dump but gives only the consent of the government without conferring any such right. Like a government license to sell liquor, it confers no right but only permission to sell upon complying with state or municipal requirements and regulations.

I agree with you that Congress has no sanitary powers and that such powers are vested exclusively in the states. But Congress has power over commerce and navigation, and the dumping of dredgings by government contractors is a necessary incident of such power. When the sanitary power of the state and the power over commerce and navigation, vested in Congress, conflict, the former must give way.

In concluding, permit me to quote the following from the opinion of Attorney General John W. Griggs, which is mentioned above:

"If it be thougnt that, in the performance of the work of improving the harbor of Chicago, any detail of the mode adopted by the Secretary of War—for instance, the place selected for deposit of dredged material—will be injurious or dangerous to the health or comfort of the people of that city, the remedy is by appeal to the good sense, discretion and fairness of the Secretary, and not by municipal interference with public work ordered by Congress, or the arrest of persons engaged in that work. And while an ordinance of the City of Chicago may, as to all persons subject to its jurisdiction, forbid the deposit of any heavy substance in the waters of Lake Michigan within 8 miles of the shore in front of that city, it can not control or limit the power of Congress over the navigable waters of the United States, nor dictate where it shall or where it shall not deposit, within such waters, material removed in the improvement of one of its harbors."

Very respectfully yours,

CLARENCE N. BOORD,

Assistant Corporation Counsel.

In re AUTHORITY OF THE FIRE MARSHAL TO MAKE CHANGES FROM TIME TO TIME IN THE RULES AND REGULATIONS OF THE FIRE DEPARTMENT.

JUNE 21, 1909.

HON. JAMES HORAN, Fire Marshal.

Dear Sir:

Your letter of the 21st inst., addressed to the Corporation Counsel, has been referred to me for reply.

In answering your inquiry as to the authority of the Fire Marshal to make changes from time to time in the rules and regulations of the Fire Department, I beg, first, to call your attention to Section 830 (Chapter 23) of the Revised Municipal Code of Chicago of 1905, which provides:

"The Fire Marshal shall have sole and absolute control and command over all persons connected with the Fire Department of the city, and shall possess full power and authority over its organization, government and discipline, and, to that end, he may prescribe and establish, from time to time, such rules and regulations as he may deem advisable."

The authority given to the Fire Marshal by the foregoing section unquestionably requires him to regulate the time of service of firemen with reference to hours "on" and "off" active duty, and in the absence of an ordinance prescribing those hours (no such ordinance is now in force), it becomes the particular duty of the Fire Marshal to, by rule, regulation or order, arrange to at all times have a sufficient number of men on active duty to perform the routine work of the department and meet any emergency that may arise.

The power given to the Fire Marshal by the foregoing section to "prescribe and establish, from time to time, such rules and regulations as he may deem advisable," carries with it the power to make such changes in those rules as he may consider expedient.

I have examined the published Council Proceedings of March 26, 1906, referred to in your letter, and find no council order or ordinance providing for the employment of additional men in order that leave of absence or any particular number of hours off may be given to firemen. The appropriation ordinance of March 26, 1909, contains an item as follows: "One hundred

thirty nine pipe-men, truck-men and drivers at $840, for 9 months, $87,570.00." This item merely makes provision for the payment of firemen to the number of 139 who may be employed not exceeding nine months during the year 1906.

Respectfully yours,

CLYDE L. DAY,

Assistant Corporation Counsel.

In re ultra vires FOR CITY TO ENTER CONTRACT TO PAY DAMAGES SUFFERED BY PUBLIC SERVICE CORPORATION.

JULY 15, 1909.

HON. WILLIAM CARROLL, City Electrician.

Dear Sir:

Your communication to the Corporation Counsel under date of July 8, 1909, requesting an opinion as to whether an agreement has been made and entered into, by which the city, through its city council or other proper authority, has agreed to bear the expense of handling the wires, conduits and other equipment of public service corporations, referred to in exhibits hereto attached, and what provision has been made for the payment of such expense, has been referred to me.

From an examination of the papers handed me it appears that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and the Chicago Terminal Division of the Pennsylvania lines are about to remove the wires of the Commonwealth Edison Company from the old viaduct in the vicinity of Campbell avenue from 12th to 18th streets, preparatory to raising the tracks of their road, and the question to be determined is the liability of the city in the premises.

The Commonwealth Edison Company is a public service corporation whose authority to occupy and use the public streets is derived from an ordinance passed by the city council granting it whatever rights it has in the public streets.

The question is presented whether the city, in passing the ordinance permitting and directing the Chicago Terminal Division of the Pennsylvania lines and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to elevate the plane of their tracks, has incurred any liability for elevating the plane of

the roadbed of these tracks so as to interfere with or compel the readjustment of the wires, conduits and other equipment of the Commonwealth Edison Company.

Section 5, referred to in the communication of the Commonwealth Edison Company, refers to the manner and method of restoring the streets for the use of the public as soon as practicable, and provides for the restoration of all water pipes, conduits, sewers, and all other similar sub-structures belonging to the city as may be disturbed by such excavation, and other equipment of public service corporations.

The contention of the Commonwealth Edison Company that the city is liable for the expense incurred in handling, moving or readjusting its wires because of the removal of the viaduct and the elevation of the tracks of the railroad companies, is untenable. The elevation of the tracks for the purpose of removing a dangerous grade crossing is an exercise of the police power by the city council that can not in any manner make the city liable to any public service corporation that may have permission to use the streets.

The easement acquired by the Commonwealth Edison Company under and by virtue of the ordinances of the city council is subject to the paramount right of the public, and in constructing its wires, etc., it knew, or was bound to know, that its use of the streets or viaducts for the purpose of laying its wires was liable at any time to be interfered with whenever the city authorities might deem it necessary for the public welfare.

In the case of *Scranton Gas & Water Company v. City of Scranton,* 214 Pa. St., 586, the court, in discussing a case in point, say:

"Where a city changes the grade of a street in order to do away with a railroad grade crossing, and a Gas and Water Company is obliged to remove its pipes from the street by reason of the change of grade, the company can recover no damages from the city for the injuries sustained."

In this case what was done by the city was clearly within what is known as the police power, and it is wholly immaterial how it was denominated in the ordinance or what the city authorities thought in regard to it. It is sufficient to say that the rights of a public service corporation using the public streets,

viaducts, or approaches thereto are held and enjoyed subject always to the earlier and superior rights of the public in the streets of the municipality. Had the city undertaken to assume the liability for the handling and readjusting of the wires of the Commonwealth Edison Company, such act would have been *ultra vires* and void. The city is only liable for the absence of reasonable care and skill in the execution of such work, and its officers can not lawfully contract nor bind it beyond this without express charter power.

In *Nashville v. Sutherland,* 92 Tenn., 335, the court say:

"It was within the power of the officers of the city to agree to put in any given kind of sewer and valve (had they done so) as part consideration for the grant of right of way; but they could not, in the absence of charter power, bind the city by a guarantee that they or it would put in such pipe or valve as would prevent overflow to the injury or damage of defendants, and thus make the city insurers of property against such injury."

This proposition is nothing short of a statement that the city can not assume the risk which should be borne by public service corporations. In this state the constitution expressly forbids such action on the part of the city.

In *Kirby v. Citizens' Ry. Company,* 48 Md., 168, appellee was the owner of a horse railway and appellants were about to construct a sewer under the bed of the street in pursuance of a contract with the city. The question was as to whether appellee was entitled to an injunction to restrain appellants from removing the railway tracks. The court, in passing upon the matter, used the following language:

"In the exercise of the police power, they have the right not only to obstruct, but to discontinue entirely the use of the street as a highway, so long as it may be necessary for the purpose of constructing a sewer under the bed of the street.

The easement acquired by the appellee under its charter and the ordinances of the Mayor and City Council, is subject to this paramount right, and in constructing its railway, the appellee knew or was bound to know, that its use of the bed of the street for railway purposes, was liable at any time to be interfered with, whenever the city authorities might deem it neces-

sary for the public welfare . . . and whatever injury may result therefrom, must be regarded in law as *damnum absque injuria.*"

In *National Water Works Co. v. City of Kansas,* 28 Fed. Rep., 921, Mr. Justice Brewer then presiding in the Circuit Court for the West Division of Missouri, used the following language:

"The amount in controversy is small, but the question involved is important. The plaintiff contends that by this contract it was bound to lay its water pipe in this street; that it did lay it in the place and manner by the city directed, and thereby acquired such a vested property right in an undisturbed location and possession that any future trespass upon or invasion thereof, like any other attack on private property, would subject the city to an action for damages; while the contention of the city is that the matter of sewerage is one affecting the public health; that it could not if it would, and it did not if it could, contract away the right to construct sewers in any part of the public streets it might deem necessary; and that the plaintiff took its contract right to lay its pipes in the public streets subject to the paramount and inalienable right of the city to construct its sewer wherever therein, in its judgment, the public interests demanded.

"I think this contention of the city is correct."

Citing in approval the famous:

Slaughter House Cases, 16 Wall., 36, and

Butchers' Union Co. v. Crescent City, 111 U. S., 746.

In the case of *Anderson v. Fuller,* et al., 51 Fla., 380, the court say:

"While municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety and convenience, notwithstanding the same may interfere with legal franchise rights; . . . and if in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause

of action against the corporation for reimbursement on acount thereof. And the city in such case has no authority voluntarily to *burden itself or its taxpayers with the payment of damages necessarily consequent upon the reasonably careful and skillful execution of its authorized public works.*"

If an agreement has been entered into by the City of Chicago for the payment of the damages referred to, it is clear from the authorities that such an agreement would be void as beyond the powers of the city council. If any provision has been made for the payment of any such expenses, such provision would be *ultra vires* as being beyond the power of the city council.

I am of opinion, after a careful reading of the authorities cited, that the city is in no way liable for the expenses incurred by the interference with public service corporations in the exercise of any privilege granted by the city, and that any effort to assume such liability on the part of the city would be void, and that any tax-payer in the city could properly maintain a bill to restrain any public official of the city from paying out any public moneys upon any such void and unauthorized contract.

Respectfully submitted,

FRANKLIN A. DENISON,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

In re RIGHT OF CHICAGO RAILWAYS COMPANY TO SELL ELECTRIC POWER.

AUGUST 20, 1909.

HON. HERMAN G. REDWANZ, Alderman Twenty-fourth Ward.

Dear Sir:

Replying to your request of August 18, 1909, concerning the right of Chicago Railways Company to furnish Riverview Park with electric power, I beg to advise you as follows:

In order that the Chicago Railways Company may have the right to furnish electric power to Riverview Park, it must be authorized by its charter to furnish such power, and it must also be authorized by the ordinance under which it conducts

its power along the streets of the city to sell the power, which it so conducts.

I have caused an examination of the company's charter to be made, and am of the opinion that the said charter does not authorize said company to sell electric power.

I am further of the opinion that the ordinance by which the City of Chicago granted to said company the right to set its poles and string its wires in the streets of the City of Chicago does not authorize said company to sell power conducted along said wires.

Yours very truly,
CHARLES M. HAFT,
Assistant Corporation Counsel.

In re GRADES SUPERIOR AVENUE.

OCTOBER 4, 1909.

HON. JOHN J. HANBERG, Commissioner of Public Works.

Dear Sir:

We return herewith letter addressed to Chief Engineer Hittell, Board of Local Improvements, by W. H. Hedges, Bench and Street Grade Engineer, relative to the grade of Superior avenue, between Eighty-third and Eighty-sixth streets, which you transmitted to us with your letter asking if the city can now compel the Calumet & South Chicago Railway Company to bring its tracks to grade and if not, can the Board of Local Improvements proceed with the improvement and set the curbs to the grade established in the improvement ordinance and lay the pavement to fit the car tracks without defeating the collection of the special assessment and what assurance the Board of Local Improvements can give the contractor that he will not suffer a loss if the improvement is made to fit existing conditions.

If the tracks of the street railway company were laid to a grade given that company by the officer or employe of the city who had immediate charge of such work and the tracks are in good condition, we are of the opinion that while the city can compel the company to lay its tracks according to the true grade of the street, the cost of making this change cannot, when

these circumstances are considered, be imposed upon the company.

The fact that the ordinance providing for the local improvement fixes a grade differing from the one theretofore existing, if the improvement is to be paid for by special assessment, does not defeat collection of the assessment unless the difference is a substantial one materially affecting the cost.

Yours very truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

In re QUESTION AS TO THE RIGHT OF THE CITY TO REMOVE SEVERAL TREES ON THE EAST SIDE OF PRAIRIE AVENUE, JUST NORTH OF MADISON STREET.

OCTOBER 29, 1909.

HON. CHARLES J. FORSBERG, Alderman Thirty-fifth Ward.

Dear Sir:

Referring to our conversation of this morning, relative to communication addressed to you by William L. Wagner, complaining that several trees are standing in the middle of the sidewalk on the east side of Prairie avenue, just north of Madison street, and your request based thereon to be advised as to the right of the city to remove said trees, I desire to say, that, in my opinion, the city has the unquestioned right to remove said trees.

Shade trees in the public streets of the city are the property of the municipality and it has complete control over them.

Baker v. Town of Normal, 81 Ill., 108.

City of Mt. Carmel v. Shaw, 155 Ill., 37.

In *City of Chicago v. O'Brien,* 111 Ill., 532, at page 536, the court says:

"A sidewalk is a portion of a public highway, appropriated, it is true, to pedestrians alone, but still open and free to all persons desiring to use and enjoy it as a public highway. It is as much a public highway in the mode of its use as the street

itself. The difference in the manner of their use does not render one public more than the other. They are both free to be properly used and enjoyed by the entire public and are constructed alike for their use."

While it seems clear that the city may, if it so desires, remove the trees in question, I deem it advisable in this opinion to call your attention to an ordinance passed by the City Council, March 22, 1909, Council Proceedings of that date, page 3346, creating the office of City Forester, and describing the duties of said office, and in order that the trees may be removed without damage to themselves, if it be decided to remove them, and that they may be planted elsewhere, if it be deemed advisable to do so, I would respectfully suggest that before action is taken in the matter, that the City Forester be advised of what may be contemplated in this respect.

Your letter is returned herewith.

Yours truly,
JAMES F. BURNS,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re PUBLICATION OF ORDINANCES.

NOVEMBER 2, 1909.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

We have your letter asking for an opinion as to whether or not it is necessary that penal and appropriation ordinances be published in a newspaper, and stating that you understand there is a recent decision bearing on the subject.

In a case involving the validity of the tax levied by the City of Springfield, our Supreme Court in People v. Florville, 207 Ill., 79, held that as the appropriation ordinance had not been published in any manner, the tax levy ordinance was void. This follows other cases in which that court held that the appropriation ordinance must be published. The language of the statute, Section 3, Chapter 5, City and Village Act, is that "all ordinances of cities and villages imposing any fine, penalty,

imprisonment or forfeiture or making any appropriation shall within one month after they are passed be published at least once in a newspaper published in the city or village . . . and no such ordinance shall take effect until ten days after it is so published."

We are of the opinion that under this statute, penal and appropriation ordinances must be published at least once in a newspaper within thirty days after they are passed.

While Section 4 of Chapter 5 of the City and Village Act provides that ordinances when printed in book or pamphlet form and purporting to be published by authority of the city council need not be otherwise published and such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances as of the dates mentioned in such book or pamphlet, we believe this means merely that such book or pamphlet is prima facie evidence and not conclusive evidence of the passage and publication of the ordinance, and the vitality of the ordinance depends upon its publication in a newspaper.

In Bullis v. Chicago, 235 Ill., 472, 478, the Supreme Court held that the statute has not made the proceedings of the City Council—although purporting to be published by authority of the council—evidence of the existence of an ordinance.

Yours very truly,
WM. D. BARGE,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re PITNEY COURT AND 16-FOOT ALLEY IN BROAD AND PITNEY'S SUBDIVISION IN N. W. QUARTER, SECTION 32, 39, 14.

NOVEMBER 3, 1909.

HON. ARTHUR B. MCCOID, Chairman, Committee on Public Lands.

Dear Sir:

In accordance with the request of your committee I herewith hand you opinion relating to the rights of the City of Chicago to the 66-foot street designated on the plat as Pitney

court and lying between Lots 55 to 58 on the west and Lots 59 and 76 on the east thereof, in Broad & Pitney's subdivision in the northwest quarter of Section 32, Township 39, North Range 14, and also to the 16-foot alley running parallel with Thirty-first street from said Pitney court to Benson street, the ownership of which is claimed by the Universal Gas Company.

In 1881 John McCaffery, the owner of all the lots above mentioned, filed a deed of vacation vacating all said lots and the south 80 feet of Pitney court and that part of James street lying south of said Lots 68 to 76. The title to said Lot 58 and the south 47 feet of said Lots 68 to 76 passed by *mesne* conveyances from John McCaffery to P. D. Armour, as did also, by quit-claim deeds, the title to that part of Pitney court and James street, vacated by deed of John McCaffery, as above stated.

On April 12th, 1886, P. D. Armour filed a burnt record proceeding, Circuit Court 393 B. R. (Wilson & Moore, attorneys). On April 27, 1887, a decree was entered by the Circuit Court approving a report of Henry Waller, Master-in-Chancery, which found that on February 8, 1871, Margaret A. Green was the owner and in possession of said Lot 58 and the south 47 feet of said Lots 68 to 76 and was the owner in fee simple of the south 80 feet of Pitney court and of James street between Broad (Benson) street and Pitney court. After reciting the *mesne* conveyances from Margaret A. Green to John McCaffery, it found that said McCaffery vacated said street so laid out upon the above described strips of land in due form of law and that the public easement in and over the same or any part thereof was then and thenceforth forever set aside and annulled and John McCaffery became and was the sole and absolute owner of the same and each part thereof in fee simple, free and clear of and from any right or easement of the public or of any person or corporation, except said McCaffery.

It appears that no part of Pitney court has ever been vacated by the City Council and there has been no *express* vacation by deed of that part of Pitney court now under consideration by the Public Lands Committee.

It is claimed by the gas company that there was, however, a revocation of the offer to dedicate Pitney court made by the

plat of Broad & Pitney's Subdivision, as follows: By three warranty deeds, dated May 19, 1882, John McCaffery and wife conveyed the lots in question in undivided thirds to William H. Mitchell, John J. Mitchell and John E. Hayner. By quit-claim deed of the same date John McCaffery and wife conveyed Pitney court, south of Thirty-first street and north of the south 80 feet thereof (vacated by deed as above), and the 16-foot alley to the two Mitchells and Hayner; that on February 4, 1895, by two warranty deeds, William H. Mitchell and John E. Hayner, and their respective wives, conveyed their undivided one-third interest each in said lots in question to John J. Mitchell and by warranty deed, dated September 14, 1894, John J. Mitchell and wife conveyed the said lots to the Universal Gas Company. By quit-claim deed, dated February 4, 1895, the two Mitchells and Hayner and their respective wives conveyed Pitney court, south of Thirty-first street and north of the portion vacated by deed by John McCaffery and the said 16-foot alley to the Universal Gas Company.

I am unable to find that there ever has been an acceptance or user of Pitney court or said alley, either by the city or the public generally, and it is claimed that from 1874 to 1895 the same was occupied by lumber yards.

It is claimed that in 1895 the plant of the Universal Gas Company was constructed, the 5,000,000 cubic foot gas holder standing squarely across Pitney court, as designated on the plat.

It is claimed by the gas company that Broad & Pitney Subdivision was not a statutory plat owing to the fact that the acknowledgement by Broad & Pitney as proprietors was made two days before the surveyor's certificate.

This proposition appears to be established by the case of *Village of Auburn v. Goodwin,* 128 Ill., 57, the court saying (pp. 62-63):

"Section 20 provides that the plat or map, after having been completed, shall be certified by the surveyor and acknowledged by the proprietor which certificate of the surveyor and acknowledgement shall be recorded and form a part of the record . . . By the very terms of the statute the surveyor's certificate is a requisite part of the plat when acknowledged by the

proprietor. *The plat is neither entitled to acknowledgement or record until it has first been certified by the surveyor.* His certificate must also be recorded and form a part of the record. Then, and not until then, does it become evidence of title."

The plat being non-statutory, the same constitutes simply evidence of an offer to dedicate to the public an easement over the strip of land in question for use for street purposes. I am unable to find that there was ever any formal acceptance of this offer. There appears to be no act of the public authorities indicating acceptance and I have been unable to ascertain that there was ever any work done on said street or that the same was ever used by the public.

There having been no acceptance by the city prior to 1882 of the offer to dedicate, the conveyance made by John McCaffery on May 19, 1882, to the two Mitchells and Hayner operated to withdraw the offer to dedicate.

A dedication of land for the use of the public as a highway may be withdrawn at any time by the proprietor before its acceptance.

In *Forbes v. Balenseiver,* 74 Ill., 183, at p. 187, the court said:

"It has been said many times by this court, and if any principle is settled, it is, that a dedication, to be valid and binding, must be given by the owner of the land to the public for a highway, and must have been accepted and appropriated to the use intended: *that their must be evidence of acceptance, and until there is, the owner may withdraw his offer and appropriate the land to any other purpose he may choose; . . .*" And a conveyance by the proprietor, before acceptance, operates as such a withdrawal.

And in *City of Chicago v. Drexel,* 141 Ill., 89, at pp. 107, 110, the court said:

"We fail to find in the record any clear, distinct or unequivocal evidence of any acceptance of said dedication prior to September 18, 1871, the date at which Hundley executed to Nixon a deed purporting to convey to him all the grantor's interest in that part of section 21, etc., lying east of said block 12. In fact, we find no evidence of any acts of the authorities of said town during that entire period of over fifteen years, even

tending to establish an acceptance or an intention to accept a dedication of the strip of land on the lake shore for a street. . . .

"We are of the opinion that Hundley's conveyance of the strip of land in question to Nixon, September 18, 1871, was in law a revocation of his offer to dedicate said land to the public for the purposes of a public street, and that no acceptance of the dedication by the authorities of said town or its successors subsequent to that date could be of any avail."

In *Village of Crete v. Hewes,* 168 Ill., 330, at p. 333, the court said:

"In fact, this strip was never accepted by the public authorities. The acceptance of the dedication must be held to have been made, if at all, in view of the fences as they existed at the time; and as the strip in controversy, by conveyances and fencing, was withdrawn from the dedication offered by the plat before there was any acceptance, the public acquired no rights therein."

It is claimed, however, by the Universal Gas Company that even if Pitney court and the 16-foot alley in question had been accepted by the city or the public generally, a long abandonment of its use for public purposes coupled with the acquiescence of the city in the construction by the gas company of valuable improvements twelve years ago amounting to $200,000.00 and over on the same would operate to estop the city from now claiming any right to open Pitney court and said 16-foot alley.

In the case of *People v. City of Rock Island,* 215 Ill., 488, the court said:

"It has frequently been decided that the doctrine of estoppel *in pais* is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such extensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud

and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and if they do not, any citizen may take the necessary steps to do so, and if there is not only a failure to act by either, but affirmative action by the public authorities with the apparent approval of every one interested, under which the situation is changed and permanent improvements are made, the principles of equity require that the public should be estopped."

The same principle has been applied in a number of other cases.

Reichert Milling Co. v. Village of Freeburg, 217 Ill., 384.
City of Chicago v. Illinois Steel Co., 229 Ill., 309.
City of Peoria v. Central National Bank, 224 Ill., 67.

I am of opinion, that the plat of Broad & Pitney's Subdivision as recorded shows a common law dedication and Pitney court and the 16-foot alley never having been accepted, no title is vested in the City of Chicago; and the respective owners of the property having had the exclusive and undisputed possession of the same and having made improvements thereon to the amount of $200,000.00, I am further of the opinion that the City of Chicago is now equitable estopped from asserting any rights to said street and alley, even if the city had acquired a legal title thereto.

Respectfully yours,
ROBERT R. JAMPOLIS,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re ALLEY BETWEEN PAULINA STREET AND WOOD STREET, SOUTH OF BLUE ISLAND AVENUE, OCCUPIED BY TRACKS OF C. B. & Q. RY.

NOVEMBER 12, 1909.

HON. ARTHUR B. MCCOID, Chairman, Committee on Public Lands.

Dear Sir:

Complying with the request of your committee for an opinion relative to the city's rights in the alley between Paulina street and Wood street, south of Blue Island avenue, occupied by tracks of the Chicago, Burlington & Quincy Railway Company, I beg to reply:

It appears from the plats of the City Map Department that this alley is located in Block 8 in S. J. Walker's Dock Addition to Chicago, a subdivision of the east half north of the river of Section 30, Township 39, north, Range 14, which subdivision was recorded November 18, 1871, in Book 1, page 3, of Plats, document No. 3317.

At the time this subdivision was made, no alley was dedicated therein. Subsequently, Block 8, as aforementioned, was resubdivided, the subdivision being recorded November 10, 1873, in Book 6, page 57, as document No. 135039. In this subdivision the 16-foot alley in question was dedicated. From information furnished me by Mr. John D. Riley, Superintendent of Maps, the subdivision was made by a surveyor in the employ of Mr. S. S. Greeley, now of the firm of Greeley, Howard & Company, in the Chicago Opera House Block, who states that at the time of the making of this subdivision and the laying out of the 16-foot alley no tracks existed in same.

The Railway Company claims that the Greeley-Carlson & Company atlas of the City of Chicago shows that the tracks were in said alley at the time the re-subdivision was made. This atlas, however, was made September 1, 1884, some years subsequent to the re-subdivision. I am informed that the Railway Company owns the property on both sides of the alley, but no legal vacation of said alley was ever had.

There are two kinds of dedications, statutory and common-law. The former vests the legal title to streets and alleys in

the city; the latter leaves the legal title in the dedicator. I find that the alley under consideration comes within the former.

The purchaser of a lot in a statutory plat acquires no title to the land of a street or alley therein, but only the land within the actual limits of his lot.

Citing:

Canal Trustees v. Haven, 11 Ill., 554.

Nor can a statutory offer to dedicate a street or alley be withdrawn except as authorized by statute.

Town of Lakeview v. LaBahn, 120 Ill., 92;

Hamilton et al. v. C. B. & Q. Ry. Co., 124 Ill., 235.

Section 1, Chapter 145, Hurd's Revised Statutes of Illinois, 1908, page 2183, provides:

"1. THREE-FOURTHS VOTE REQUIRED—DAMAGES.] Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That no city council of any city, or board of trustees of any village or town, whether incorporated by special act or under any general law, shall have power to vacate or close any street or alley, or any portion of the same, except upon a three-fourths majority of all the aldermen of the city or trustees of the village or town authorized by law to be elected; such vote to be taken by ayes and noes, and entered on the records of the council or board. And when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law."

I am informed that no vacation of said alley was ever sought by the adjoining owners.

In the case of *Russell v. City of Lincoln,* 200 Ill., 511, which involved the rights of certain streets and alleys under a common-law dedication, the court, at page 517, said:

" . . . yet when the owner has caused a survey and plat to be made, signed, acknowledged and recorded, in which he offers to dedicate certain streets and alleys shown thereon for a public use and has sold lots and blocks designated thereon in accordance with the description given upon the plat, he cannot withdraw such offer of dedication, but leaves the streets and alleys indicated upon the plat to be opened by the municipal

authorities at such time as the public interest may require and of which time they are the judges. Elliott on Roads and Streets, 2d ed., sec. 118; Earll v. City of Chicago, 136 Ill., 277; Rusk v. Berlin, 173 id., 634; Eisendrath & Co. v. City of Chicago, 192 id., 320; Village of Augusta v. Tyner, supra; Lee v. Town of Mound Station, 118 Ill., 304; Town of Lake View v. LeBahn, supra; Reilly v. City of Racine, 51 Wis., 526; Town of Derby v. Alling, 40 Conn., 410; Shea v. City of Ottumwa, 67 Iowa, 39; Henshaw v. Hunting, 1 Gray, 203; Meier v. Portland, etc., Co., 16 Ore., 500."

And the court held in said case that one who purchases two blocks of ground and builds a fence around the entire tract so as to enclose the street between such blocks, which street had been dedicated as at common law, cannot hold the street as against the city, although he has been in undisturbed possession for thirty years, where he was not misled as to the existence of the street and has erected no improvements thereon except the fence by which he enclosed it.

In this case, the Railway Company has placed tracks in said alley, but no permanent improvements have been made.

While we are of the opinion that a statutory dedication of the alley was had, yet even if it were claimed that nothing but a common-law dedication was had, under the ruling in the case of Russell v. City of Lincoln, supra., no valuable improvements having been placed thereon, the doctrine of equitable estoppel could not apply in this case.

I am, therefore, of the opinion that the city has lost no rights in said alley since its dedication and that the Railway Company should pay compensation for the use of the same or remove the obstruction thereon.

Yours truly,

ROBERT R. JAMPOLIS,
Assistant Corporation Counsel.

CHICAGO, ILLINOIS, October 16, 1909.

HON. CHARLES M. FOELL, Chairman Committee on Harbors, Wharves and Bridges, Chicago.

Dear Sir:

Your letter of September 20, addressed to the Corporation

Counsel, in which you ask for a statement of the authorities on certain legal questions relating to the railroad terminal situation in connection with the proposed building of docks near the mouth of the Chicago River, has been referred to me.

1. THE COMMON LAW. A railroad company is a common carrier and pursues a public calling. It is well settled at common law that it is the duty of a railroad company to treat all shippers alike without discrimination. It must furnish reasonably adequate facilities for the carriage of property and persons. To the extent of its facilities it must receive and carry goods tendered for carriage at its regular stations for all persons alike, without discrimination either in charges or facilities and, unless prevented by the act of God or the public enemy, when it undertakes to carry goods, it must deliver safely to the consignee the goods so carried.

Illinois Central Railroad Co. v. Morrison and Crabtree, 19 Ill., 136.

Chicago & North Western Railway Company v. The People, 56 Ill., 365.

Peoria & Rock Island Ry. Co. v. The Coal Mining Company, 68 Ill., 489.

The common law duty of the carrier to carry goods for all who tender goods for carriage is confined to the carriage of the goods themselves and as well the packages or receptacles in which the goods are packed in the common course of trade. It does not extend to the carriage of freight or passenger cars. In other words, at common law there is no duty on the part of a railroad company to carry the cars of another railroad company, either loaded or unloaded.

Atchison, Topeka & Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co., 110 U. S., 667.

McAllister v. Chicago, Rock Island & Pacific R. R. Co., 74 Mo., 351.

Oregon Short Line & Utah Northern Ry. Co. v. Northern Pacific R. R. Co., 51 Fed., 465.

Oregon Shore Line & Utah Northern Ry. Co. v. Northern Pacific R. R. Co., 61 Fed., 158.

Neither at common law nor under the Statutes of this State or of the United States has one railroad company the

right to operate its trains over the tracks of another company.

II. INTRASTATE COMMERCE IN ILLINOIS. In Illinois under the provisions of the Constitution of 1870 as interpreted by the courts, a railroad company is held to be a common carrier of the freight cars of other connecting lines when properly tendered to it for carriage, that is to say: In intrastate business in Illinois a railroad company must carry not only the goods tendered it by shippers for carriage, but it must also carry carloads of goods between regular stations on its own line for connecting lines without breaking bulk. Within the limits of this State a shipper may have his goods carried from one city to any other city in the original car in which such goods are loaded. Whether this rule applies to carriage of cars tendered by connecting lines at or near a terminal when such carriage is practically a switching service is discussed later on in this opinion. Section 12 of Article XI of the Constitution of 1870 is as follows:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly shall, from time to time, pass laws, establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state."

Section 10 of the same Article provides that the rolling stock and all other movable property of any railroad corporation shall be considered personal property. The Supreme Court has interpreted these two provisions of the Constitution to mean that railroad companies in this State are common carriers of cars.

Peoria & Pekin Union Ry. Co. v. Chicago, Rock Island & Pacific R. R. Co., 109 Ill., 135.

Peoria & Pekin Union Ry. Co. v. U. S. Rolling Stock Co., 136 Ill., 643 (citing 109 Ill., 135, *supra*).

Schumacker v. Chicago & Northwestern Ry. Co., 207 Ill., 199 (dictum).

Wabash R. R. Co. v. Farrell, 79 Ill. App., 508 (dictum).

There have been similar decisions also in Massachusetts

and in other states under constitutional or statutory provisions similar to those of Illinois.

Michigan Cent. Ry. Co. v. Smithson, 45 Mich., 212.

Vermont, etc., R. R. Co. v. Fitchburg R. R. Co., 14 Allen, 462.

Mackin v. Boston, etc., R. R. Co., 135 Mass., 201.

Thomas v. Missouri Pacific Ry. Co., 109 Mo., 187.

C., B. & Q. R. R. Co. v. Curtis, 51 Neb., 442.

Chicago, etc., R. R. Co. v. Dev, 76 Iowa, 278.

Louisville, etc., Ry. Co. v. Williams, 95 Ky., 199.

Pittsburg, C., C. & St. L. Ry. Co. v. Hunt et al., 86 N. E., 328 (Indiana).

Supplementing the constitutional provisions heretofore cited, the Constitution and Statutes of this State define in considerable detail the duty of railroad companies to allow the connection of their tracks with the tracks of other companies, and define also certain other duties devolving upon the railroad companies because of the fact that they are engaged in a public calling. Section 5, Article XIII of the Constitution provides in part as follows:

"All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used, by such railroad companies; and all railroad companies shall permit connections to be made with their tracks, so that any such consignee, and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad."

Paragraph Sixth of Section 20, Chapter 114 of the Illinois Statutes, provides that railroad corporations shall have power

"To cross, intersect, join and unite its railways with any other railway before constructed, at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings and switches, and other conveniences, in furtherance of the objects of its connections; and every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite with the corporation owning such

new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in manner prescribed by law."

Hurd's Revised States of Illinois, 1908, page 1664. Section 1 of an "Act to enable railroad companies to enter into operative contracts and to borrow money," approved February 12, 1855, provides that all railroad companies incorporated under the laws of this State shall have power to make contracts with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof.

Hurd's Revised Statutes of Illinois, 1908, page 1664. Section 2 of the same Act provides as follows:

All railroad companies incorporated or organized, or which may be incorporated or organized as aforesaid, shall have the right of connecting with each other, and with the railroads of other States, on such terms as shall be mutually agreed upon by the companies interested in such connection."

Hurd's Revised Statutes of Illinois, 1908, page 1669. Section 22 of "An Act in relation to fencing and operating railroads," approved March 31, 1874, is in part as follows:

"Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way-passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively, upon the due payment, or tender of payment of tolls, freight or fare legally authorized therefor, if payment shall be demanded."

Hurd's Revised Statutes of Illinois, 1908, page 1677. Section 25 of Chapter 114 of the Illinois Statutes is as follows:

"The General Assembly shall have power to enact, from

time to time, laws to prevent and correct abuses, and to prevent unjust discriminations and extortions in the rates of freight and passenger tariff, and to establish reasonable maximum rates of charges for the transportation of persons or property on any railway that may be constructed under the provisions of this act, and to enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of the property and franchises of any such corporation."

Hurd's Revised Statutes of Illinois, 1908, page 1665. Section 1 of the Act to prevent extortion and unjust discrimination, approved May 2, 1873, provides that any railroad which shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight or for the use and transportation of any railroad car upon its track or upon any of its branches, shall be deemed guilty of extortion. Section 2 of the same Act prohibits unjust discrimination in rates or charges for the transportation of freight or passengers or for the transportation of any railroad car on any railroad line or its branches.

Hurd's Revised Statutes of Illinois, 1908, page 1684. A subsequent section of the Act provides for the imposition of fines and penalties for its violation and it is also provided that such fines may be recovered in an action of debt instituted in the name of the People, and in such cases a preponderance of evidence in favor of the People shall be sufficient to authorize a verdict and judgment for the People. The "Act to establish a Board of Railroad and Warehouse Commissioners, and to prescribe their powers and duties," approved April 13, 1871, provides for the appointment of a commission to supervise in certain respects the railroad and warehouse business in the State. Section 11 of this Act is in part as follows:

"Said Commissioners shall examine into the condition and management, and all other matters concerning the business of railroads and warehouses in this State, so far as the same pertain to the relation of such roads and warehouses to the public, and to the accommodation and security of persons doing business therewith; and whether such railroad companies and warehouses, their officers, directors, managers, lessees, agents and employes, comply with the laws of this State now in force, or

which shall hereafter be in force concerning them. And whenever it shall come to their knowledge, either upon complaint or otherwise, or they shall have reason to believe that any such law or laws have been or are violated, they shall prosecute or cause to be prosecuted all corporations or persons guilty of such violation."

Hurd's Revised Statutes of Illinois, 1908, page 1698. Section 13 of the same Act is as follows:

"The property, books, records, accounts, papers and proceedings of all such railroad companies, and all public warehousemen, shall at all times, during business hours, be subject to the examination and inspection of such Commissioners, and they shall have power to examine, under oath of affirmation, any and all directors, officers, managers, agents and employes of any such railroad corporation, and any and all owners, mangers, lessees, agents and employes of such public warehouses and other persons, concerning any matter relating to the condition and management of such business."

Hurd's Revised Statutes of Illinois, 1908, page 1700. Section 17 of the Act makes it the duty of the Attorney General or the State's Attorney of any county upon the request of the Board of Railroad and Warehouse Commissioners, to institute and prosecute suits for the violation of the Act and for the violation of any law of this State concerning railroads or warehouses.

Hurd's Revised Statutes of Illinois, 1908, page 1700. Section 1 of "An Act in relation to crossing of one railroad by another, and to prevent danger to life and property from grade crossings," approved May 27, 1889, as amended by an Act approved May 25, 1907, gives to the Railroad and Warehouse Commission the power to prescribe "the place where and the manner in which" railroad crossings shall be made.

Hurd's Revised Statutes of Illinois, 1908, page 1706. Section 8 of the Act to prevent extortion and unjust discrimination provides in part as follows:

"The Railroad and Warehouse Commissioners are hereby directed to make, for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of

passengers and freights, and cars of each of said railroads; and said schedule shall in all suits brought against such railroad corporations wherein is, in any way involved the charges of any such railroad corporation for the transportation of any passenger or freight, or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freights, and cars upon the railroads for which said schedules may have been respectively prepared."

Hurd's Revised Statutes of Illinois, 1908, page 1686. Section 7 of the same Act makes it the duty of the Commissioners to investigate and enforce the provisions of the Act.

It will thus be seen from an examination of the provisions of the Constitution and Statutes of this State that, subject to the supervision in certain respects of the Railroad and Warehouse Commission, a railroad company may connect its tracks with the tracks of other companies and that when tracks are so connected, one company must (at least when such connections are not at or near terminal points) accept for carriage the loaded or unloaded freight *cars* of another company for a reasonable compensation and without discrimination as to rates or facilities when such cars are engaged in intrastate commerce. Illinois, however, has not gone so far in its railroad legislation as under any circumstances to require one company to carry loaded passenger cars of another company or to require one company to permit the use of its tracks for the operation of freight or passenger trains of another company.

There is probably no doubt but that the rule laid down by the Illinois Supreme Court will hold good where the cars of a connecting carrier can be carried without in effect turning over a terminal of one carrier to the use of other carriers. Doubtless the rule will stand where the connection is made at ordinary junctions along the route, and the language of the court is broad enough to include in the scope of the rule connections at or near terminal points. The rule in this State, as applied to the precise question here raised, as to the duty of a railroad company to receive and carry the freight cars of connecting carriers at or near a terminal where the service required is substantially

a switching service, has not been passed upon by our Supreme Court. A question, the same in most respects, however, was before the Court of Appeals of Kentucky, in a case where it was sought to impose upon a railroad company the obligation to carry cars loaded with live stock tendered it for carriage by a connecting line, where the connections were within the limits of the City of Louisville near its terminal yards, and to tender carloads of stock to another connecting line to be delivered at other yards on the connecting line. The Kentucky Constitution requires an interchange of cars by connecting railroads at points of physical connection between the tracks. The trial court entered a decree granting the relief prayed for and this decree was affirmed by the Kentucky Court of Appeals.

Louisville & Nashville Railroad Company v. Central Stock Yards Company, 97 S. W., 778.

This case, however, was taken to the Supreme Court of the United States on a writ of error, and there the decision of the Court of Appeals of Kentucky was reversed.

Louisville & Nashville R. R. Co. v. Central Stock Yards Co., 212 U. S., 132.

It was held that the constitutional provision of the State was void as taking property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, because it did not provide for compensation for the use of the cars of connecting carriers, and because also the Constitution was not supplemented in this respect by the proper statutory provisions as to compensation. It was further held that that part of the decree of the State Court which required the Louisville & Nashville Railroad to receive, switch, transport and deliver cars of live stock consigned from another yard within the city to its own yards and offered to it at connecting points in the city by a connecting carrier, was unconstitutional. The court said:

"If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars

offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

This case, decided January 25, 1909, seems to take an extreme position in declaring the provision of the Constitution of Kentucky to be contrary to the Fourteenth Amendment to the Constitution of the United States. The decision was by a divided court. Mr. Justice Holmes wrote the opinion of the majority of the court. Mr. Justice McKenna, with whom Mr. Justice Harlan and Mr. Justice Moody concurred, dissented. That part of the opinion which deals with the failure of the State of Kentucky to provide by the Constitution or by Statute for the payment of adequate compensation for the use of cars, seems not to apply to Illinois, where the General Assembly has made such provision by Statute. But if we apply the reasoning of the latter part of the opinion relating to the terminal situation in Louisville, to the dock situation in Chicago, it seems to follow that the railroad company which has a terminal at the docks would not be obliged to haul the cars of all connecting lines where the connections are near such terminal, and not at regularly established stations of the company, and where the service performed is essentially a switching service. By forcing a connection of its tracks with the tracks of the railroad whose terminal is at the docks (as it may do under the Statute), any other railroad in Chicago could obtain the use of such terminal on payment of the established switching charge.

The Railroad and Warehouse Commission of Illinois has established maximum charges for switching loaded cars. These charges have been fixed by Rule 23 (as amended) of the Illinois Commissioners Schedule of Freight Rates and Classification No. 10.

Report, Railroad and Warehouse Commission of Illinois, 1908, pages 51-54.

The rule defines what shall be considered the switching limits in every town, city and village, and defines also in considerable detail what shall be considered connecting line switch-

ing and industrial switching, and provides for a reasonable maximum rate for each class of switching in cases where the distance is less than three miles, and also in cases where it is more than three miles and less than five miles. It is specifically declared to be the duty of all railroad companies on request to provide the necessary equipment, and to perform switching service upon being tendered the proper charges therefor.

It is provided that the rule shall not apply in any case where the point of origin or destination is without the switching limits and the charge for switching services is covered by through tariff, nor shall it apply in any case where the switching charge is absorbed by the railroad or railroads interested, nor shall it apply to interstate commerce. It is also provided that the rule shall not apply to any city, town, or village where the Commission has established a special switching district.

Supplementing Rule 23, as amended, the Commission has established a Chicago Switching District which extends from Lincoln Street, Evanston, on the north to a point a considerable distance south of the intersection of the shore of Lake Michigan with the Illinois-Indiana State line. The western boundary of the district is an irregular line beginning on the south at a point on the main line of the Illinois Central Railroad Company one mile south of Harvey, from there extending northwesterly, north and northeasterly and ending on the north at the intersection of Lincoln Street, Evanston, with the main line of the Milwaukee Division of the Chicago & Northwestern Railway Company. For the Chicago district, three classes of switching are defined: connecting line switching, intermediate switching and industrial switching. Maximum rates are established for each class of switching.

It is further declared to be the duty of all railroad companies in the Chicago Switching District, on request, to provide the necessary equipment and to perform switching service upon being paid or tendered the proper charges therefor.

It is also provided that the rule with reference to the Chicago Switching District shall not apply where the point of origin or destination is without the switching limits of the district and the charge for switching services is covered by through tariff,

nor in any case where the charge is absorbed by the railroad or railroads interested, nor shall it apply to interstate commerce.

The charges fixed by the Commission seem not to take into account the special use of a terminal such as might be established at a dock in Chicago. This makes the situation in Chicago very much like the situation in Louisville, except that a dock is a public utility, whereas the stock yards in Louisville were private enterprises and in a way a part of the railway terminal. If a public warehouse were to be operated at and in connection with the docks, the situation would also be somewhat different, yet, I am of the opinion that the reasoning of Justice Holmes might be held to apply. Notwithstanding, therefore, the provisions of the Illinois Constitution and Statutes, after a study of the decision of Justice Holmes in the Louisville case, I am of the opinion that the safe position for your Committee to take is that a railroad company connecting its tracks with the proposed docks, in the absence of a contractual obligation such as is hereafter suggested, will not be obliged in many cases to haul the cars of other railroads from points of connection in or near its principal Chicago terminal (and not at regular stations) to the docks and from the docks to such points of connection even when such hauling is a part of intrastate commerce.

I am advised that but two railroads, the Chicago & Northwestern (and the owners of switch tracks connected therewith—see *Chicago Dock Co. v. Garrity,* 115 Ill., 155), and the Illinois Central (and its lessees or licensees) have railway terminals at or near the mouth of the Chicago River. I have examined the special Acts of the General Assembly relating to these two companies and I find in them nothing that can properly be construed as exempting them from the duties imposed on other railroad companies in the State in respect to the matters discussed in this opinion and likewise nothing which would impose on those companies any greater obligations in respect to these same matters than is imposed by law on other companies. Section 11 of the Illinois Central Charter provides (substantially as does the General Railway Act) that the company shall make connections with other lines and afford "facilities in the transshipment of freight and passengers and interchange of cars."

Private Laws of Illinois, 1851, page 65.

III. INTERSTATE COMMERCE. The Act to Regulate Commerce, commonly known as the "Interstate Commerce Act," as amended, applies to the transportation of persons or property by railroad from one State or Territory or the District of Columbia to any other State or Territory of the United States, from one Territory to another Territory, from the United States to an adjacent foreign country, and from any place in the United States through a foreign country to any other place in the United States. It applies also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or in an adjacent foreign country. The Act applies also to the carriage of persons or property, "partly by railroad and partly by water when both are under a common control, management or arrangement for the continuous carriage or shipment." The Act applies also to the interstate and international transportation of oil or other commodities (except water and gas) by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water.

Act to Regulate Commerce (as amended), Section 1.

The Act does not apply to all water lines.

Capehrt & Smith v. Louisville & Nashville R. R. Co., 41 I. C. C. R., 265.

Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S., 197.

The Act also applies to express companies and sleeping car companies and to bridges and ferries used or operated in connection with railroads and to switches, spurs, tracks, terminal facilities, depots, yards, cars and other vehicles and instrumentalities of shipment or carriage, and to all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration and icing, storage and handling of property transported.

Act to Regulate Commerce (as amended), Section 1.

Unjust and unreasonable charges for the transportation

of passengers or property are prohibited and declared to be unlawful.

Act to Regulate Commerce (as amended), Section 1.

The last paragraph of Section 1 of the Act is in part as follows:

"Any common carrier subject to the provisions of this Act, upon application of any lateral branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in Section 13 of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in Section 15 of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

Paragraph 2 of Section 3 of the Act is as follows:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any

such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 7 of the Act is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

It will be seen that the provisions of Section 3 are supplemented by the provisions of Section 7 of the Act. It would seem that these two sections might be so construed as to impose a duty upon one railroad company to receive and transport the loaded cars of another connecting line and that it would require railroad companies which by agreement or otherwise receive and transport loaded cars of one connecting line to extend the same privileges to other connecting lines. The Interstate Commerce Commission in several instances has ruled that when a railroad company voluntarily carries the cars of one connecting line it must give equal facilities to other connecting lines, where the conditions are substantially the same, but the courts in a majority of cases have refused to enforce such orders of the Commission.

Snyder's Interstate Commerce Act and Anti-trust Laws, pages 80 and 81.

It seems now to have been settled by the courts that under the provisions of the Interstate Commerce Law a railroad company is not bound to receive and transport traffic in the cars of other companies where it has cars of its own equally available for the purpose.

Oregon Short Line and Utah Northern Ry. Co. v. Northern Pacific Ry. Co., 51 Fed., 465.

(Affirmed) *Oregon Short Line and Utah Northern Ry. Co. v. Northern Pacific Ry. Co.,* 61 Fed., 158.

Little Rock & Memphis R. R. Co. v. St. Louis, Iron Mountain & Southern Ry. Co., 59 Fed., 450.

(Affirmed) *Little Rock & Memphis R. R. Co. v. St. Louis, Iron Mountain & Southern Ry. Co.,* 63 Fed., 775.

Gulf, Cal. & S. F. R. R. Co. v. Miami S. S. Co., 86 Fed., 407.

Prescott & A. C. R. R. Co. v. A., T. & S. F. R. R. Co., 73 Fed., 438.

Allen v. Oregon R. & Nav. Co., 98 Fed., 16.

Central Stock Yards Co. v. Louisville & Nashville R. R. Co., 118 Fed., 113.

(Affirmed) *Central Stock Yards Co. v. Louisville & Nashville R. R. Co.,* 192 U. S., 568.

Railroad Commission of Kentucky v. Louisville & Nashville R. R. Co., 10. I. C. C. R., 173.

Atchison, Topeka & Santa Fe Ry. Co. v. Denver & New Orleans R. R. Co., 100 U. S., 667.

Commissioner Prouty clearly stated the rule when he said in his opinion in the *Louisville & Nashville R. R. case,* 10 I. C. C. R., 173, *supra,* at pages 188 and 189:

"Probably the framers of the Act to regulate commerce supposed that the third section would compel, under certain circumstances, such interchange of cars. A moment's thought will show that every such exchange is a matter of contract between the parties in which the terms and conditions upon which the exchange shall be made are specified, and it is apparent to one at all acquainted with railway operations that to arbitrarily compel the interchange of cars under all circumstances would be unjust. The Act to regulate commerce provides no means for determining when carriers shall be compelled to make this interchange, or for fixing the conditions upon which it shall be made, and in construing that Act the courts have, with practical unanimity, held that carriers were still free to make arrangements of this sort by contract among themselves, and that there was nothing in the Act which authorized either the Com-

mission or the courts to compel one railroad Company to deliver its cars to another." Citing:

Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 2 I. C. C. R., 351; 37 Fed. 567.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co., 4 I. C. C. R., 249; 51 Fed. 465.

Little Rock & M. R. Co. v. St. Louis & S. W. R. Co., 4 I. C. C. R., 854; 63 Fed., 775.

"Just what the seventh section may have been intended to accomplish is not certain. Possibly the legislature had in mind that railways might attempt to relieve themselves from its provisions by interrupting traffic at State lines, and thereby deprive it of the character of interstate business. The seventh section may have been intended to prevent this. At any rate we are clear that it adds nothing to the third section in support of this claim of the complainant, and conclude that the Act to regulate commerce does not confer upon this Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier. This Commission has more than once called the attention of Congress to this state of the law. Second Annual Rep., p. 70, and nearly every report since."

While relief has been granted to connecting railroads under certain conditions, as in

New York & N. R. R. Co. v. N. Y. & N. E. R. R. Co., 50 Fed., 867.

Bigbee & Warrior Rivers Packet Co. v. Mobile & Ohio R. R. Co., 60 Fed., 545.

Augusta Southern R. R. Co. v. Wrightsville & T. R. R. Co., 74 Fed., 522,

the weight of authority is to the effect that a railroad may carry the cars of one connecting carrier and refuse to do likewise for another connecting carrier without subjecting itself to a charge of discrimination as defined by the Interstate Commerce Law. It seems that the provision contained in the last three lines of Section 3 to the effect that the section shall not be construed as requiring a common carrier to give to another carrier the use of its tracks or terminal facilities, is relied upon as a

justification for the decisions which follow the rule above stated to be supported by the weight of authority.

Section 13 of the Interstate Commerce Act provides that any person, firm, corporation or association or any mercantile or manufacturing society or any *body politic* or *municipal organization* complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act in contravention of such provisions, may apply for relief to the Interstate Commerce Commission by petition. The Commission has power to investigate such complaints and to make such orders as may be necessary to enforce the provisions of the Act.

Act to Regulate Commerce (as amended), Sections 13 and 14.

Paragraph 2 of Section 15 of the Interstate Commerce Act is as follows:

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

Act to Regulate Commerce (as amended), Section 15.

This section of the Act, it will be observed, gives the Inter-State Commerce Commission power after a hearing on a complaint to establish a through route and a joint maximum rate between points where no reasonable or satisfactory through route exists. This clause has been rather strictly construed by the Commission in several cases where there has been a refusal to establish a new through route between two points because of the existence (in the opinion of the Commission) of another reasonable or satisfactory route between the same points, e. g.:

Stedman v. C. & N. W. Ry. Co. et al., 13 I. C. C. R., 167.

Enterprise Transp. Co. v. Pennsylvania R. R. Co., 12 I. C. C. R., 326.

Cardiff Coal Co. v. C., M. & St. P. Ry. Co. et al., 13 I. C. C. R., 460.

Chicago & Milwaukee Elec. R. R. v. Ill. Cent. R. R. Co., et al., 13 I. C. C. R., 20.

The term "through route" itself as applied to carload lots, as modern traffic is carried on, implies, as a matter of fact, carriage throughout all the route in one car. Judge Williams in *Little Rock & M. R. R. Co. v. St. Louis, etc., Ry. Co.,* 59 Fed. 400, *supra,* stated this matter concisely when he said (page 410):

"The prayer of the bills cannot be granted without compelling the defendants to permit the plaintiff to run its own, or cars other than those of the defendants, over their tracks. To stop the cars at the point of physical connection and reload the freight into the cars of the receiving company is to break a through routing; and to break a through routing is to break a through rating."

It will be noticed also that this section gives to the Commission the power, in establishing a through route and joint rate, to prescribe "the terms and conditions" under which the route shall be operated. The question of whether, when a through route is established for carload lots over two or more connecting lines, the goods must be carried all the way in the car in which they are first loaded, and the question of the right of any particular line to furnish the car seems thus far to have been settled by the lines themselves, although it seems clear that the Commission in establishing a through route could, on making proper provision as to compensation, prescribe as a condition that goods consigned in carload lots should be carried in the original car wherever practicable.

Live Stock and Cattle Raisers' Associations v. Texas & Pacific Ry. Co. et al., 12 I. C. C. R., 32.

In practice this is always done for the reason that the joint rate for carload lots is based on the assumption that the original car will go through to its destination without unloading or reloading. Thus there is no object in any line refusing to carry a loaded car delivered to it by a connecting line. No line will go to the extra expense of unloading or reloading at a connect-

ing point when a maximum joint rate has been established by the Commission or by agreement between the connecting lines.

IV. THE POWER OF THE CITY. Paragraphs 25, 26, 27, 66 and 90 of Section 1, Article V, of the *Cities and Villages Act* (supplemented by certain provisions of Section 8 of Chapter 4 of the *Chicago Charter Act* of 1863) and Section 24 of the *"Act in relation to fencing and operating railroads,"* approved March 31, 1874, give to the city almost plenary police power over railroads, but such power does not go so far as to prescribe methods of operation, as, for example, that one company shall carry the cars of connecting lines within the limits of the city.

Hurd's Revised Statutes, Illinois, 1908, pages 317, 319, 321 and 1677.

Paragraph 5 of Section 19 of the *General Railroad Act* provides that the construction of a railroad upon or across any street in any city, incorporated town or village must be with the assent of such city, town or village.

Hurd's Revised Statutes, Illinois, 1908, page 1664.

As a condition of allowing a railroad company to construct its tracks over or across public streets for the purpose of connecting its tracks with a privately owned dock, or as a condition of connecting at all with a dock owned by the city, the City Council could require the company to agree to haul the cars of connecting lines to and from such dock for a reasonable compensation and without discrimination in its own favor, and such a condition would be binding when assented to by the company and would not violate any constitutional provision, nor would it be in conflict with the Statutes of the State or with the Interstate Commerce Law.

State of Iowa v. C., M. & St. P. R. R. Co., 33 Fed., 391.

Interstate Stock Yards Co. v. Indianapolis U. R. R. Co., 99 Fed., 472.

Judson, Interstate Commerce, 214.

The city also has the power to make complaint to the Interstate Commerce Commission as to violations of the Interstate Commerce Act in the matter of unjust discrimination and similar matters, and may also ask the Commission to establish a through all-rail route or a part rail and part water route

where no reasonable or practicable through route exists. The city may also present its complaint to the Illinois Railroad and Warehouse Commission as to matters affecting intrastate traffic in which the city as a corporate entity is interested. Both under the State and Federal laws, however, most of the grievances against railroads arising from time to time necessarily must be brought to the attention of the proper officials on complaint either of the shippers or of the carriers themselves.

Summarizing: A railroad connecting with a public dock must, under the Constitution and Statutes of this State, as interpreted by the Supreme Court, as far as its facilities will permit, carry the freight cars of connecting lines when such cars are engaged in intrastate traffic, and where such carriage will not in effect place the terminal of one company at the disposal of other companies, but no such obligation exists under the Interstate Commerce Law except (practically, if not legally) where a through route has been established. In this respect the Interstate Commerce Law is believed by some who have studied the subject to be defective, and the attention of Congress has been called to this defect in the law by the Interstate Commerce Commission.

Railroad Commission of Kentucky v. L. & N. R. R. Co., 10 I. C. C. R., 173 at 189.

The power of the city under both the State and Federal law is very limited except that it may exact as a condition of crossing public streets for the purpose of connecting its tracks with any public dock privately owned or as a condition of connecting its tracks at all with any dock owned by the city, that a railroad company shall haul the cars of other connecting lines to and from the dock for reasonable compensation and without discrimination. And to secure such service from the railroad company the city, in any event, has practically a free hand, in case it builds the docks itself, to enter into an agreement with the company, or in case it does not build the docks, to insist that no one else shall build them until such an agreement has been made. A very large part (probably more than 90 per cent) of the commerce which will seek accommodation at the proposed docks will be interstate commerce and hence governed by Federal law. Under the present state of that law, as we have

seen, the railroad terminal situation presents a serious problem—a problem which should be worked out before the docks are built.

EDWIN H. CASSELS.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

TERMINAL SITUATION IN CONNECTION WITH PROPOSED CHICAGO HARBOR.

CHICAGO, ILLINOIS, November 6, 1909.

Dear Sir:

On page 12 of my opinion of October 16th on the subject of the Railroad Terminal Situation in connection with the proposed building of docks near the mouth of the Chicago River, I called to your attention Rule 23 of the Railroad & Warehouse Commission of Illinois.

That rule has been amended. Since writing that opinion I have received from the Secretary of the Railroad & Warehouse Commission a copy of the amended rule. Rule 23, prior to the amendment, consisted of but one paragraph and defined switching service and also provided a maximum rate for switching loaded cars for distances not exceeding three miles. As amended, the rule defines what shall be considered the switching limits in every town, city and village, and defines also in considerable detail what shall be considered connecting line switching and industrial switching, and provides for a reasonable maximum rate for each class of switching in cases where the distance is less than three miles and also in cases where it is more than three miles and less than five miles. It is specifically declared to be the duty of all railroad companies on request to provide the necessary equipment, and to perform switching services upon being tendered the proper charges therefor.

It is provided that the rule shall not apply in any case where the point of origin or destination is without the switching limits and the charge for switching services is covered by through tariff, nor shall it apply in any case where the charge is absorbed by the railroad or railroads interested, nor shall it apply to interstate commerce. It is also provided that the rule shall not apply to any city, town or village where the Commission has established a special switching district.

Supplementing Rule 23, as amended, the Commission has established a Chicago Switching District which extends from Lincoln street, Evanston, on the North, to a point a considerable distance South of the intersection of the shore of Lake Michigan with the Illinois-Indiana state line. The Western boundary of the district is an irregular line beginning on the South at a point on the main line of the Illinois Central Railroad Company one mile south of Harvey, from there extending northwesterly, north and northeasterly and ending on the north at the intersection of Lincoln street, Evanston, with the main line of the Milwaukee Division of the Chicago & Northwestern Railway Company. For the Chicago district, three classes of switching are defined: connecting line switching, intermediate switching and industrial switching. Maximum rates are established for each class of switching.

It is further declared to be the duty of all railroad companies in the Chicago Switching District, on request, to provide the necessary equipment and to perform switching services upon being paid or tendered the proper charges therefor.

It is also provided that the rule with reference to the Chicago Switching District shall not apply where the point of origin or destination is without the switching limits of the district and the charge for switching services is covered by through tariff, nor in any case where the charge is absorbed by the railroad or railroads interested, nor shall it apply to interstate commerce.

The amendments to Rule 23 and the supplementary provisions relating to the Chicago Switching District do not, in my opinion, affect the conclusions which I reached in my opinion of October 16th. I call it to your attention in order that as far as possible everything material bearing upon the question discussed in that letter may be before your Committee.

Yours very truly,

EDWIN H. CASSELS.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

HONORABLE CHARLES M. FOELL,
Chairman, Committee on Harbors, Wharves & Bridges,
132 Clark Street, Chicago.

CHICAGO, ILLINOIS, December 14, 1909.

HON. CHAS. M. FOELL, Chairman, Committee on Harbors, Wharves & Bridges, Chicago.

Dear Sir:

At a recent meeting of the Committee on Harbors, Wharves & Bridges, I was asked to render an opinion to the Committee on the following questions:

1. Has the City of Chicago the power to own, construct, maintain and operate docks, piers and wharves in Lake Michigan?

2. Has the City the power to build, maintain and operate warehouses in connection with the maintenance and operation of docks, piers and wharves?

3. Has the City the power to own, maintain and operate a system of lighterage boats in the Harbor and on the Chicago River to be used in connection with docks, piers and wharves?

4. Has the City the power by means of a contract ordinance to grant to a private corporation a license or franchise to build docks on the Lake Front?

In response to the request of the Committee, I have the honor to submit the following:

1. In 1875, the City of Chicago adopted "An Act to provide for the incorporation of cities and villages," commonly known as the general charter law for cities and villages in Illinois. In Chicago it supplanted the Special Charter of 1863, but by its terms, all laws or parts of laws not inconsistent with its provisions were to continue in force.

Hurd's Statutes, Illinois, 1908, Ch. 24, Art. I, Sec. 6, p. 308.

Hence, such portions of the Special Charter of 1863 relating to harbors, wharves, piers and docks as are not inconsistent with the provisions of the general charter law are still in force in Chicago.

Gage v. Chicago, 164 Ill., 577.
Swift v. The People, 162 Ill., 534.
Smith v. The People, 154 Ill., 58.
Chicago Dock Company v. Garrity, 115 Ill., 155.

The powers of the city with respect to the subject of harbors, wharves, piers and docks on Lake Michigan are defined in the following provisions of Section 1, Article V, the general charter law:

"Seventh. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, *wharves,* parks and public grounds, and vacate the same.

Thirtieth. To deepen, widen, dock, cover, wall, alter or change channel of water courses.

Thirty-first. To construct and keep in repair canals, and slips for the accommodation of commerce.

Thirty-second. To erect and keep in repair public landing-places, wharves, docks and levees.

Thirty-third. To regulate and control the use of public and private landing-places, wharves, docks and levees.

Thirty-fourth. To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

Thirty-fifth. To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.

Thirty-sixth. To fix the rate of wharfage and dockage.

Thirty-seventh. To collect wharfage and dockage from all boats, rafts or other craft landing at or using any public landing-place, wharf, dock or levee within the limits of the corporation.

Thirty-eighth. To make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges.

Thirty-ninth. To appoint harbor masters and define their duties."

"Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

"Ninety-seventh. To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the City Council or board of trustees shall deem proper."

Hurd's Statutes, Illinois, 1908, pp. 316, 317, 319 and 321.

The Special Charter of 1863, in addition to giving to the

city police supervision over the harbor, also gave to the City Council the power:

"To lay out public streets, alleys, lanes and highways, and to make wharves and slips at the ends of streets, and extend, alter, widen, contract, straighten and discontinue the same; and to purchase and lay out public parks, squares or grounds."

Special Charter of Chicago, 1863, Chapter VII, Sec. 1, Par. 1.

Gary Laws and Ordinances of Chicago, 60.

A similar provision is contained in the Special Charters of Chicago of 1837 and 1851 and in the Act of the General Assembly of 1847, supplementary to the Charter of 1837.

The Special Charter of 1863 also defined the harbor as follows:

"The harbor of the city shall include the piers and so much of Lake Michigan as lies within the distance of one mile into the lake, and the Chicago River and its branches to their respective sources."

Special Charter of Chicago, 1863, Ch. IV, Sec. 8, Par. 53.

Gary Laws and Ordinances of Chicago, 30.

Under and by virtue of the provisions of the general charter law and of the Special Charter above quoted, I am clearly of the opinion that the city has the power to own, construct, maintain and operate docks, piers and wharves in Lake Michigan at the ends of streets, and to collect wharfage and dockage from water craft using the same. At points on the shore other than at the ends of streets, the city has the same power but, in order to exercise the power it must have a grant from the State of Illinois of the title to or a license to occupy the submerged lands of the lake. The state has the title to the submerged lands of Lake Michigan and of other meandered lakes in the state, and holds it in trust for the use of the people, primarily, for fishing and for navigation, and secondarily, to a certain extent, for other public uses.

Illinois Central R. R. Co. v. Illinois, 146 U. S. 387.

Revell v. The People, 177 Ill., 468.

People v. Kirk, 162 Ill., 138.

Cobb v. Commissioners of Lincoln Park, 202 Ill., 427.

Fuller v. Shedd, 161 Ill., 462.

Hardin v. Shedd, 177 Ill., 123.

Hardin v. Shedd, 190 U. S., 508.

Hammond v. Shepard, 186 Ill., 235.

Submerged land under the waters of meandered lakes can be held or occupied only for a public purpose and with the consent of the state. The state has never granted to the City of Chicago the title to any of the submerged lands of Lake Michigan or a license to occupy the same for the purpose of constructing docks, piers and wharves, except at the ends of streets where such a license, in my opinion, may be implied from the terms of the first paragraph of Section 1 of Chapter VII of the Special Charter of 1863 which has been quoted above, and which, not being consistent with the general charter law, is now in force in Chicago. Grants similar to the grant in the Special Charter of 1863 have been construed to give to a city the right to build docks at the ends of streets and in so doing to occupy submerged lands of the state.

City of Galveston v. Menard, 23 Texas, 349.

Barney v. City of Keokuk, 94 U. S., 324.

At points on the shore other than at the ends of streets, I am of the opinion that the city has no right to occupy the submerged lands of the lake for the purpose of constructing and maintaining docks, piers and wharves, unless such right may be implied from the express grant of power to engage in such construction contained in the general charter law.

The general charter law gives to Chicago jurisdiction over Lake Michigan for three miles out, but neither this law nor the Special Charter of 1863 transferred to the city the title to the submerged lands.

Bliss v. Ward, 198 Ill., 104.

Implied grants are not favored by the law. All grants by the State to municipal corporations are strictly rather than liberally construed. If the general charter law applied only to Chicago, the argument for an implied grant would be stronger, for in order to exercise a plenary grant of power to erect and maintain docks, the City necessarily would have to occupy the submerged lands of the lake. A special charter is passed by the General Assembly having in view the local and peculiar needs and the geographical situation and physical conditions of

the municipality to which the charter is granted and it is to be interpreted having always in view such needs, situation and conditions. But the general charter law applies to all cities in the State which may choose to adopt it and it is not to be interpreted having in view the situation or local condition of any particular city. Some of the cities under the general charter law have no water front. Many of them are on navigable rivers where no grant from the State to use the submerged land for docks and wharves is necessary. Very few are on navigable lakes. If the General Assembly had intended to grant to cities on such lakes the title to the submerged lands or a license to occupy them for the construction of docks and wharves, it probably would have made such a grant in express terms.

It is a maxim of statutory construction that where a statute grants powers or rights, the expression of one power or right excludes by implication other similar powers or rights.

Lewis' Sutherland on Statutory Construction, 491.

And so, if the City is granted the right to occupy the submerged lands adjoining a certain part of the shore of the lake, the statute making the grant would not be construed by implication to grant the same right as to other parts of the shore. This principle applies to the construction of the Special Charter of 1863, which grants to the City the right to occupy the submerged lands of the lake at the ends of streets. The general charter law makes no grant at all, and as both laws should be construed together, I am of the opinion that the City cannot safely rely on an implied grant in the general charter law of the right or license to occupy the submerged lands of Lake Michigan other than at the ends of streets for the purpose of erecting docks and similar structures. Such a grant should be obtained from the General Assembly. If such a grant is not obtained, and if the City shall determine to build docks in Lake Michigan, then the question of the implied license to occupy submerged lands can be presented to the courts and the City's rights in the premises can be ascertained.

In passing, I desire to call to your attention another point. It may be asserted that the City has the right to occupy the submerged lands of the lake adjoining those parts of the shore where the City is the owner of the riparian rights. For ex-

ample: the City owns the riparian rights on the lake shore from Randolph Street to Park Row, and the Supreme Court of the United States has said that, subject to the control of the State and of the United States, as such riparian owner it may build docks and piers on the submerged land.

Illinois Central R. R. Co. v. Illinois, 146 U. S., 387.

The statement of the United States Supreme Court above referred to as to the right of a riparian owner to wharf out was largely an *obiter dictum* as that question was not directly involved in the case. In later cases, however, the same court has held that the rights of riparian owners are governed by the laws of the several states subject to the rights and powers over interstate commerce granted to the United States by the Federal Constitution.

Shively v. Bowlby, 152 U. S., 1.

Hardin v. Shedd, 190 U. S., 508.

And the Supreme Court of Illinois in a decision rendered after the decision of the United States Supreme Court in the Shively case, has held that a riparian owner of lands on Lake Michigan has no right to build a dock or pier out from his land and on and over the submerged land of the lake, although such owner has obtained the consent of the Federal Government.

Cobb v. Commissioners of Lincoln Park, 202 Ill., 427.

The case of *Shively v. Bowlby* was before the Supreme Court of the United States on error to the Supreme Court of Oregon and the decision of the Oregon Court, which was to the same effect as the decision of the Supreme Court of Illinois in the Cobb case, was affirmed.

Bowlby v. Shively, 22 Oregon, 410.

The Shively case, in holding that the Federal Courts will recognize the rules laid down by the State, modifies and in a way overrules the dictum in the Illinois Central case. In view of the holding in the Shively and Cobb cases, I am of the opinion that the City cannot successfully maintain a claim of right to build docks, piers and wharves on and over the submerged lands of the lake by virtue of its ownership of riparian rights appurtenant to shore lands, since it has, in the absence of an express or implied grant, no greater rights than other riparian owners.

2. It is elementary that a municipality has only such powers as are expressly granted to it by the State and such other powers as are germane to an express grant of power and incidental to and reasonably necessary to be exercised in carrying out such express grant of power.

Dillon, Municipal Corporations, 91.

Neither the general charter law nor the Special Charter of 1863 grants to the City of Chicago the express power to build, maintain or operate warehouses. Whether or not the City has power to build, maintain and operate warehouses in connection with docks, piers and wharves, depends on a question of fact, namely: whether the operation of warehouses is necessarily incidental to the operation of docks, piers and wharves. The fact that warehouses are most desirable and convenient accessories or appurtenances to docks and are a source of increased profit will not make their operation necessarily incidental to the operation of the docks and justify the City in operating them and in collecting compensation for their use. On the other hand, commerce, as now conducted on the Great Lakes, requires certain storage or warehouse facilities on the docks themselves and such facilities, I am of the opinion the City has the power to maintain and operate as necessarily incident to the operation of the docks. Further than this, in my opinion, the City has no power to operate warehouses in connection with the operation of docks, piers and wharves.

3. The General Assembly has not granted to the City of Chicago express power to own, maintain or operate a system of lighterage boats in the harbor and on the Chicago River in connection with the operation of docks or otherwise. The exercise by the City of such a power, therefore, can be justified only in case the operation of lighterage boats is incidental to the operation by the City of docks and a reasonably necessary instrumentality to be used in connection with such operation. This is, of course, a question of fact. It will doubtless be admitted that the operation of a system of lighterage boats in connection with the operation of docks built at certain points on the shore of Lake Michigan is greatly to be desired and of great advantage to the dock owner, in facilitating the use of the docks, in making them available to a larger number of lake

and rail transportation lines, in increasing the amount of tonnage which may be handled and in increasing the income derived from the docks. It also will doubtless be admitted that in a great city like Chicago, with its many inland railroad terminals and with its congested streets, there may be a more urgent need for the operation of lighterage boats in connection with docks than in a smaller city with ample street facilities or in a city where the railway terminals are so situated that they easily can be connected with the docks. Nevertheless, a system of lighterage boats, while operated in connection with docks necessarily must be operated in a way as a distinct and separate enterprise—one which I do not believe the courts would hold in the legal sense to be incidental to the operation of docks. I am therefore of the opinion that the City has no power to own, maintain and operate a system of lighterage boats in the harbor and on the Chicago River. Additional power to enable the City to own, maintain and operate or lease warehouses, vaults, lighterage boats and all proper and advantageous terminal facilities used in connection with or appertaining to docks and piers (if such power is desired by the City) should be obtained from the General Assembly.

4. The answer to the first question propounded by the Committee has shown that the City of Chicago has been granted by the General Assembly plenary police power over the harbor and very full and complete power to regulate the harbor and all landing-places, wharves, docks and levees, and to control the use of the same and in addition thereto, the power to fix the rate of wharfage and dockage and to collect wharfage and dockage charges from water craft using public landing-places, wharves, docks or levees. Aside from retaining the title to the submerged lands, the State has in effect turned over the control of the harbor to the City. That the General Assembly has the right to grant such powers to the City is a proposition which I believe will not be questioned. It is well settled that the authority to regulate the construction of docks, piers and wharves within their limits may be delegated by the legislature to municipal corporations.

Farnham on Waters, Vol. 1, page 551.

Acting under and by virtue of the power thus granted,

the City Council has, by ordinance, adopted general rules and regulations with reference to the use of the harbor and the construction and use of docks, piers and wharves. It has defined the harbor as consisting of the Chicago River and its branches, the Calumet River, and all slips connecting with the rivers, the Ogden Canal, the Drainage Canal, all piers and basins, and the waters of Lake Michigan, including all break-waters, piers and terminal structures therein, for the distance of three miles from the shore. It has created the office of Harbor Master, and has given to that officer supervision of the harbor under the direction of the Commissioner of Public Works. It has also provided that any person repairing, renewing, altering or constructing a dock within the City shall first secure a permit from the Department of Public Works, which permit shall specify the character and location of such repairing, renewal or construction.

Revised Municipal Code of Chicago, 1905; Ch. 31, pp. 278-195, inclusive.

I think it clearly within the power of the City Council under the terms of the general charter law, to require that anyone who proposes to build a dock or a pier anywhere in the harbor, shall first obtain from the City a permit or some similar authority therefor. The important question is whether or not the authority exercised by the City Council over the harbor and the structures erected and to be erected therein shall be exercised by a general ordinance or by special ordinances confined in their application to specific localities. Ordinarily, police and regulatory powers granted to a city by the state should be exercised so far as possible and practicable by a general ordinance applying alike to all parts of the city. But when local conditions in different parts of the city differ, then the power may be exercised by an ordinance or ordinances of local application only and designed to meet the needs of each locality.

Richmond, Fredericksburg & Potomac R. R. Co. v. Richmond, 96 U. S., 521.

Chicago v. Brownell, 146 Ill., 64.

City of East St. Louis v. Wehrung, 46 Ill., 392.

Chicago v. Stratton, 162 Ill., 494.

People v. Cregier, 138 Ill., 401.

Barbier v. Connolly, 113 U. S., 27.
Soon Hing v. Crowley, 113 U. S., 703.
Chattanooga v. Norman, 92 Tenn., 78.
People v. Lewis, 86 Mich., 273.
Commonwealth v. Patch, 97 Mass., 221.

Such ordinances, however, must not discriminate between localities similarly situated.

Wherever it is proper to pass a police or regulatory ordinance limited in its application only to a particular locality, it follows that it will be proper to pass a contract ordinance applying to such locality. It is no objection to the validity of an ordinance that it combines contractual obligations and police regulations.

McQuillin, Municipal Ordinances, 11.

The harbor of Chicago, as we have seen, includes rivers, canals, slips and the waters of Lake Michigan, and it will not be disputed that there is a great difference in the conditions and in the requirements of the different parts of the harbor. For example, the Chicago River and the Lake front are so different in their situation, and require such entirely different harbor facilities, that regulatory ordinances applying only to the Lake front or to the River would be justified. But there are not only the differences in situation and in the character of the facilities required. Under a well planned scheme of harbor improvement, the River and the Lake front would doubtless each in the main be so improved as to accommodate a class of shipping or a kind of water craft different and in a way distinct from the other.

This brings us to the question of whether or not the local conditions at different parts of the Lake front vary to such an extent that legislation by the City Council applying to a particular locality would be justified under the rules of law which have been laid down by the courts. I am of the opinion that as a matter of fact there is such a difference between the physical and commercial conditions at different parts of the Lake front as to justify the City Council in passing reasonable legislation applying only to a specific locality. Different localities along the Lake front differ in their distances from the Chicago River and from the Calumet River. They differ in their distances

from the retail, wholesale, manufacturing and residential districts of the City, in their proximity to railroad terminals, to the principal thoroughfares for heavy traffic, to Government break-waters and light-houses and to parks. They differ in the depth of the shoal waters, in their accessibility to water craft plying on the Lake, in the character of the shipping which they can accommodate, and, doubtless, in many other important particulars.

It is always difficult and usually presumptuous for one not an expert to attempt to pass on a question of fact and, in any case, the last word is always for the courts. Nevertheless, a careful reading of the report of the Harbor Commission, supplemented by such other information as has been accessible, in my opinion, justifies me in saying that the dock problem on the Lake shore is a problem which the City Council has the power to solve by considering the situation and possibilities of each locality on the shore and applying to localities similarly situated the regulations and imposing the conditions best adapted to the local situation and commercial needs. At the same time the Council may follow some comprehensive plan which includes all the harbor development on the entire shore.

If the City Council should pass a mandatory police or regulatory ordinance, limited in its application to a specified locality on the Lake front, and require for revenue purposes the payment of a fee for a permit or license or require compensation substantially larger than the amount reasonably necessary to pay to the City the cost of such regulation and of the issuing of the necessary permits, a question might arise as to the power of the City to exact such fee or compensation.

As has been seen, the City has the power to *regulate* public landing-places, wharves, docks and levees and to control their use and to make regulations in regard to the use of harbors. It may be contended that the thirty-third and thirty-eighth paragraphs of Section 1, Article V of the general charter law which have been heretofore set out in extenso, refer more particularly to the *use* of harbors and landing-places; but I believe a fair construction of these paragraphs gives the City the power not only to regulate the *use* but also to regulate the *construction* of docks, wharves and other landing places. It will be noticed

that with reference to harbors and harbor structures the power to *license* is not given. The general rule of law is that where no specific power to license is given to a city, it has, nevertheless, as incidental to its police power and to the power to regulate such enterprises as the building and use of docks, the power to require the taking out of a license or permit and to exact therefor a reasonable fee not substantially in excess of the cost of issuing such license or permit and the cost of the necessary regulation and police supervision.

Freund, Police Power, Par. 30.

McQuillin, Municipal Ordinances, page 18.

Abbot, Municipal Corporations, pages 232-233.

Cooley on Taxation, page 408.

But the Supreme Court of Illinois has applied a more liberal rule of construction with reference to license fees, and has held that where only the power to regulate has been given to a city it may, as an incident to such power, require the taking out of a license and to exact a fee or compensation which may be substantially in excess of the cost of regulation and police supervision.

Kinsley v. City of Chicago, 124 Ill., 359.

Packing & Provision Company v. Chicago, 88 Ill., 221.

Poyer v. Village of Desplaines, 22 Ill. App., 576.

See also *Horr & Bemis, Municipal Police Ordinances,* 259.

In view of the attitude of our Supreme Court, I am of the opinion that under the power to regulate, it is proper to exact a fee which may be in excess of the actual cost to the City of such regulation, and which as a matter of fact, may be productive of revenue to the City. But, of course, such fee must be reasonable. And the City has no power to exact a license fee or other compensation for a privilege which has already been obtained from the United States under the terms of a Federal statute controlling and granting the privilege.

Harmon v. City of Chicago, 147 U. S., 396.

Where the express power to license is given, our Supreme Court has held many times that the fee exacted for such license may be in part for the purpose of raising revenue.

Banta v. City of Chicago, 172 Ill., 204.

Howland v. City of Chicago, 108 Ill., 496.

Distilling Company v. City of Chicago, 112 Ill., 19.

Where a person engages in an enterprise over which the City has full power of regulation and control, and accepts a permit or privilege under an ordinance which provides for compensation in excess of the cost of such regulation, the passing by the City and the acceptance by the grantee of the ordinance constitutes a contract and the person who accepts the ordinance will be bound by its terms. There is a consideration for such a contract in that the person who receives a permit or license from the City is securing something which is necessary for him to secure and which the City has the right to exact, and he cannot afterward be heard to complain that the fee or compensation which he has voluntarily agreed to pay for such a permit or license is larger than might have been imposed by a mandatory police or regulatory ordinance.

The question of the power of a city to grant an ordinance for the construction of docks on the Lake front has not been passed on by our Supreme Court, but contractual agreements between municipalities and the builders of docks have been upheld by our own and other courts.

City of Chicago v. Van Ingen, 152 Ill., 624.

City of Baltimore v. White, 2 Gill., 444.

Verplanck v. Mayor, etc., of New York, 2 Edw. Ch., 220.

Martin v. O'Brien, 34 Miss., 21.

If it should be held by the courts that the City does not have the power to pass a contract ordinance and thus to enter into a contract with a private party for the construction of docks on the Lake Shore, still if a contract ordinance is passed by the City Council and accepted by the grantee and acted upon, the grantee will be estopped from raising the question of the power of the City to pass the ordinance.

McQuillin, Municipal Ordinances, page 426, par. 278.

Chicago General Ry. Co. v. City of Chicago, 176 Ill., 253.

City of Chicago v. Van Ingen, 152 Ill., 624.

City of New York v. Sonneborn, 113 N. Y., 423; 21 N. E., 121.

City of Buffalo v. Balcom, 134 N. Y., 532; 32 N. E., 7.

Town of Bristol v. Bristol & Warren Water Works, 19 R. I., 413; 32 L. R. A., 740.

In my opinion, therefore, the City may safely proceed on

the theory that it has the power by means of a contract ordinance, the terms of which are not contrary to or in conflict with the laws of the State or of the United States, to grant to a private corporation a license or franchise to build docks at a particular place on the Lake shore, provided such place is so situated, all things considered, as to require a type and size of dock structure peculiar to itself or regulations which would not be applicable to docks located at other points on the shore; and such corporation, on accepting the ordinance, may proceed under the ordinance to build and operate the docks provided, of course, that it has a permit from the secretary of war, the consent of the State of Illinois to occupy submerged lands for the purpose of building docks, and provided also that such corporation is the owner or lessee of the riparian rights attaching to that part of the Lake shore opposite which it proposes to build its docks.

Before any such ordinance is passed by the City Council I am of the opinion that the present general ordinance, which requires that any one who proposes to build a dock shall first obtain a permit from the department of public works, should be amended so that it shall provide that the permit or consent of the City Council shall first be obtained before any dock is built on the Lake front. Such a change in the general ordinance will also necessitate some other changes which it is not necessary to discuss in this opinion.

In giving my opinion on this question, I am not unmindful of the fact that in case your Committee should take up for consideration any ordinance authorizing the construction of docks off the shore of Lake Michigan just north of the Chicago River, many intricate and difficult questions both general and local necessarily will arise which obviously it would be unwise, if not impossible, to attempt to anticipate and to discuss in this opinion. I believe, however, that such questions as have occurred to me can be solved and that a valid contract ordinance may be framed which will cover general and local questions and which the City will have ample power legally to enforce.

I answer the questions submitted by your Committee as follows:

Answer to Question number 1: Yes (with qualification).

Answer to Question number 2: Yes (with qualification).

Answer to Question number 3: No.

Answer to Question number 4: Yes (with qualification).

Respectfully submitted,

EDWIN H. CASSELS.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

In re TITLE TO CHICAGO DOCK & CANAL COMPANY PESHTIGO SUB.

CHICAGO, ILLINOIS, JANUARY 20, 1910.

HON. CHARLES M. FOELL, Chairman Committee on Harbors, Wharves & Bridges, Chicago.

Dear Sir:

I submit the following in response to the request of your Committee for an opinion on the title to the shore lands on Lake Michigan from the Chicago River north to the south line of Ohio Street, described briefly as follows: Lots 23 and 24 of the Chicago Dock & Canal Company's Re-subdivision of original Water Lot 35 and accretions, Lot 7 of Peshtigo Dock Addition and that portion of the Lake Shore Drive between Ohio and Indiana Streets, all in Kinzie's Addition to Chicago. Lots 23 and 24 are south and Lot 7 north of the Michigan Slip.

I have examined:

(a) The plats, indices and part of the records in the office of the Recorder of Cook County.

(b) The following maps (among others) in the office of the City Engineer of Chicago, Bridge & Harbor Division:

1. Main part of the Harbor of Chicago, 1865, by Col. W. F. Raynolds, U. S. Corps of Engineers.

2. Chicago Harbor, Survey of July, August and September, 1861, by Col. S. I. Crams.

3. Chicago Harbor, June, 1876, by G. L. Gillespie.

4. Map showing proposed extension of Lake Shore Drive, undated.

5. Chicago Harbor, 1893, by Capt. W. L. Marshall, Corps of Engineers, U. S. A.

6. Chicago Harbor, 1895 (blue print).

(c) The maps and plates in the office of the City Map Department.

(d) The following maps and plats in the custody of War Department in Chicago:

1. Chicago Harbor and Bar, 1856, by Maj. J. D. Graham, U. S. Topographical Engineers.

2. Chicago Harbor and Bar, 1857, by Maj. J. D. Graham, U. S. Topographical Engineers.

3. Chicago Harbor and Bar, 1869, by Wm. T. Gasgrain, C. E., and others under direction of Maj. J. E. Wheeler, Corps of Engineers, U. S. A.

4. Map of Chicago Harbor, 1873, by First Lieut. F. A. Hinman, Corps of Engineers, U. S. A.

5. Map of Chicago Harbor, 1874, by Maj. G. L. Gillespie, Corps of Engineers, U. S. A.

6. Chicago Harbor, 1892, by U. S. Engineers.

(e) The maps in the office of the Map Department of Cook County.

(f) The plat reproduced in the opinion of the Supreme Court of Illinois in *Chicago Dock & Canal Co. v. Kinzie,* 93 Ill., 415.

(g) Field notes of the survey of lands between the meander line and the present shore line of Lake Michigan, made under the direction of the U. S. Land Office, 1896.

(h) The annual Report of the Chief of Engineers of the United States Army to the Secretary of War for 1876.

(i) Plats in "The Geography of Chicago and Its Environs," by Salisbury and Alden, published by the Geographic Society of Chicago, 1899.

(j) Greeley-Carlson Atlas of Chicago, 1884. Peltzer's Atlas of Chicago, 1872. Donnelly's Atlas of Chicago, 1905.

(k) Plats and indices of records of Chicago Title and Trust Company.

(l) Plat of survey of water front between Chicago River and Ohio Street, prepared under direction of John M. Ewen, Esq., Harbor Commissioner.

(m) Map of dock terminals, Chicago & Northwestern Railway Company, Chief Engineer's Office, 1907.

(n) Certain deeds and records of the Lincoln Park Commissioners.

From such examination, I am of the opinion that the title to the shore lands from the Chicago River to the north line of Indiana Street is in the *City of Chicago* as to the ends of Water, Michigan, Illinois and Indiana Streets, and in *The Chicago Dock & Canal Company* as to the balance. The rights or title of the Chicago Dock & Canal Company are, however, subject to:

1. Rights of parties (other than itself) in possession under leases or otherwise.

2. Questions of survey.

3. Claims (if any) of mechanics, workmen or material men not shown of record which may become mechanics' liens.

4. Unpaid taxes and special assessments (if any).

5. To a trust in favor of the public that such lands shall be used in aid of commerce and navigation.

6. Rights or claims of the State of Illinois in and to so much of such shore lands as have been made by artificial filling and not by accretion and not as an incident to or a part of the construction of piers, docks, slips, canals, basins, wharves, moles, breakwaters and other erections, protections, improvements and conveniences for the accommodation of vessels.

The title of the City of Chicago to the ends of Illinois and Indiana Streets is also subject to a similar claim on the part of the State of Illinois.

I am of the opinion that the title to the shore lands from the north line of Indiana Street to the south line of Ohio Street is in *The Commissioners of Lincoln Park,* subject to:

1. Rights of parties (other than itself) in possession.

2. Question of survey.

3. Rights of John H. Londrigan and Thomas W. Sprague under and by virtue of the terms of a certain deed from the Commissioners of Lincoln Park, dated June 22, 1891.

With reference to the rights or claims of the State of Illinois in and to the lands in possession of The Chicago Dock & Canal Company, the following facts are pertinent:

In 1831, Robert A. Kinzie entered that part of Fractional Section 10, north of the Chicago River, in Township Thirty-

nine (39), Range Fourteen (14), North of the Third (3d) Principal Meridian.

In 1833, Kinzie platted Kinzie's Addition to Chicago, which extended from the Chicago River north to Chicago Avenue and from a line about fifty (50) feet west of North State Street to Lake Michigan. The Chicago Dock & Canal Company derives its title to the land which it now claims to own in Kinzie's Addition through mesne conveyances from Kinzie.

Prior to 1834, the Chicago River turned south at a point near the present line of St. Clair Street (then called Sand Street) and, running just west of a narrow sand bar, it entered the lake near the present Madison Street. In 1834, the river was straightened by cutting a channel east (with an inclination to the south) to the lake from the point where it turned south at St. Clair Street. Between the years 1833 and 1836, the United States Government constructed the North Pier from about the center line of Pine Street along the north bank of the river past St. Clair Street and out into the lake for a distance of 1817 feet east of the center line of Pine Street, or about 1200 feet beyond St. Clair Street.

This pier was thereafter extended in a northeasterly direction further into the lake as follows: In 1837 by the United States, 306 feet; in 1836-40, by the United States, 491.5 feet; in 1851, by the United States, 170 feet; in 1865, by the City of Chicago, 450 feet. These extensions carried the North Pier out to the west line of the present entrance of the Michigan Slip of the Chicago Dock & Canal Company. Thereafter, beginning in 1867 and ending in 1874, the United States extended the North Pier out into the lake for a distance of about 1000 feet east of the east line of the entrance to the Michigan Slip.

Plans for the Michigan Slip were approved by the United States in 1867, and work was commenced in that year and completed in 1871. The Slip was enlarged in 1886 and rebuilt, or partially rebuilt, in 1905.

Upon the straightening of the river and the construction of the Government work, accretions began rapidly to form. In his opinion in *Chicago Dock & Canal Company v. Kinzie,* 93 Ill., 415, 1879, Mr. Justice Scholfield, speaking of these accretions, said (pp. 426-7):

"In the year 1834, Chicago River was straightened, at and near its mouth, by cutting through the sand-bar and constructing piers, etc., and this caused accretions to form rapidly north of the river and on the east side of this addition; and these accretions now, partly by natural causes and partly by artificial means, extend out into Lake Michigan about one-half mile from what was the shore when this addition was laid out."

In Appendix Y of the *Annual Report upon the improvement of the Harbors of Chicago, Calumet, Michigan City and New Buffalo, Lake Michigan,* for 1876, Major Gillespie, of the United States Army Engineers, in speaking of the shore line at this point, said (pp. 12-13):

"The shore line at this time (1864), on the north side of the north pier, reached a point on this pier about 250 feet westward from the lighthouse tower. This shore line has steadily increased outward every year."

The various maps which I have examined show that the accretions must have formed rapidly after the straightening of the river and the extension of the North Pier. In 1833, the shore line near the mouth of the river was a short distance east of St. Clair Street. In 1883 it was approximately 2000 feet further east. There can be no doubt but that the formation of the accretions was greatly accelerated by the construction of the North Pier. It seems to be a fact that the currents of water in that part of the lake tend to carry soil and debris in a southerly or southwesterly direction, thus causing accretions to form on the north side rather than on the south side of any obstruction projecting from the shore into the lake.

It is the well settled law that natural accretions of soil caused by the action of the wind and the waves belong to the shore owner. Here, however, the accretions were accelerated by an artificial structure extended into the lake by lawful authority and not by the shore owner. And in such a case, as in the case of ordinary accretions, I am of the opinion that the title to the accretions so formed is in the owner of the shore lands.

Lovingston v. St. Clair County, 64 Ill., 56.

County of St. Clair v. Lovingston, 23 Wall, 46 (Affirming 64 Ill., 56).

Godfrey v. City of Alton, 12 Ill., 29.
City of St. Louis v. Rutz, 138 U. S., 226.
Tatum v. City of St. Louis, 125 Mo., 654.
People v. Central R. R. Co., 42 N. Y., 315.
Halsey v. McCormick et al., 18 N. Y., 147.
Adams v. Frothingham, 3 Mass., 352.
Lockwood v. N. Y. & H. R. R. Co., 37 Conn., 387.
King v. Lord Yarborough, 3 B. & C., 91.

So much of the shore land, therefore, between the river and the north line of Indiana Street as has been formed by accretions belongs to the riparian owner, the Chicago Dock & Canal Company, except the land formed at the ends of streets which belongs to the City of Chicago; and it is immaterial whether or not the accretions were accelerated by the construction and extension of the North Pier. At the time of the construction of the Michigan Slip, the shore line, as shown by the Government maps, was some distance west from the west line of the entrance to the Slip. When the Slip was constructed there must have been some open water just west from the west line of the entrance to the Slip and between the river and its south boundary. Such water no longer exists and as the place where the water must have been is now land and as it was impossible for accretions to have formed after the construction of the Slip, it may be assumed that the east portion of the present land between the Chicago River and the Michigan Slip must have been made by artificial filling.

A riparian owner, as such, has no right to fill in submerged lands adjacent to lands which he owns on the Lake Shore. Authority to fill in and use such submerged land must be obtained from the State, and the State only has the authority to permit such filling in for a public purpose and primarily for a purpose which is in aid of commerce and navigation. Whatever title The Chicago Dock & Canal Company has to such shore lands between the Chicago River and Michigan Slip as have been made by artificial filling must rest upon authority for such filling conferred by the charter of the company. This company was organized by the special act of the General Assembly of Illinois passed February 12, 1857, and amended February 22, 1861. The language of the charter is very broad.

It purports to give the company the rights to erect practically all kinds of harbor structures on the shore and in the navigable waters of the lake adjoining lands which it may own between the Chicago River and Chicago Avenue. It grants also the power of eminent domain and the right to vacate streets which pass through its lands. Sections 4 and 5 of the charter are as follows:

Sec. 4. Said company shall have the power to inclose, make and protect, and also to erect and construct, on their own lands and on the shore and in the navigable waters of Lake Michigan, (so that they do not in any manner obstruct or prevent the free navigation of the same, in front of their own lands and premises, and in front of the premises of such person or persons as may assent to the same), wharves, docks, moles, piers, breakwaters and such other erections, protections, improvements and conveniences for the safety and accommodation of boats and vessels, and the security and advantageous use of their own property, wharves and docks, or for the purposes of convenience in the use and enjoyment of said property by the said company, as the board of directors of said company may deem necessary and proper.

Sec. 5. Said company shall also have power to excavate, maintain, preserve and keep open canals, basins, slips and such other ways, with their embankments, supporters and appurtenances, for the entrance of boats and vessels of all kinds from the lake, and also from the Chicago harbor and river; to levee part of their property, lands and premises as may, by the board of directors of said company, be considered necessary and convenient for the profitable use and enjoyment of said property, and for the interests of said company.

Private Laws of Illinois, 1857, page 500.

When the Michigan Slip was constructed it was necessary either to fill in the space between the Slip and the River or to erect some kind of platform over the open water in order to provide proper facilities for the landing of vessels. In a way the land between the Michigan Slip and the River takes the place of a wide pier or a dock. The Slip is an improvement in aid of navigation and the land in question apparently was made as incidental to the making of the Slip and for use in connection

therewith. If such is the fact (and apparently such is the fact), then I am of the opinion that the Company had the right to fill in the land between the River and the Slip and that it had title to that land, subject, however, to the limitations imposed upon the use of land so made by the charter of the Company. As has been said heretofore, the corporate powers of the Company, as expressed in its charter, are broad. Nevertheless, in interpreting the charter, the well established principle of law constantly must be kept in mind that grants of the character of the grant by the State to the Chicago Dock & Canal Company are strictly construed against the grantee and in favor of the State. The Company is a private corporation for profit, but the business in which it is authorized by its charter to engage is the construction and operation of public utilities and the structures which it may erect on the submerged land and any such land which it may reclaim are impressed with a public use. Such structures and such reclaimed land are to be held and used by the Company in aid of commerce and navigation. Under its charter the Company has no power to reclaim submerged lands except as such reclamation is made in the building of structures in aid of navigation and commerce and of facilities appurtenant or incidental to such structures such, for example, as approaches to docks, piers, wharves, slips and the like and protection for the same and terminal facilities. If the Company reclaims submerged land for purposes not in aid of navigation and commerce, in my opinion, it acts without its charter power and the title to such reclaimed land would not pass to the Company on its reclamation, but would still remain in the State of Illinois. The facts, as they appear from the investigations which I have been able to make, in my opinion justify me in saying that the title to the shore lands between the Chicago River and the Michigan Slip, except at the end of Water Street, the title to which is in the City of Chicago, is in the Chicago Dock & Canal Company, and such land is to be held and used by the Company, not as it may please, but subject to the public use and in aid of navigation and commerce.

We next come to the land just north of the Michigan Slip. This land extends due north about 514 feet from the north boundary of the Michigan Slip. At the time the Michigan Slip

was built the shore line was west of the west line of what is now known as Peshtigo Court. Immediately upon the completion of the Slip and upon the building of the protecting structure on its north side, accretions probably began to form on the Lake Shore north of the north wall or protection of the Slip, and just north of and along the north wall itself. The Greeley & Carlson Atlas of 1884 shows that in the twelve years immediately succeeding the completion of the Slip the shore line apparently had moved some distance eastward, but I find no map on which it would seem to appear that any of the land east of Peshtigo Court and between the north line of Indiana Street and the Michigan Slip was formed by accretions. Sand and debris undoubtedly were carried in upon the submerged land but the maps do not show that any portion of the land east of Peshtigo Court rose above the surface of the water; that is to say, the maps do not show the shore line extending far enough east to include any portion of the land in possession of The Chicago Dock & Canal Company north of the Michigan Slip and east of Peshtigo Court. Nevertheless, it is possible that some part of the land was formed by accretions and by dumping in material excavated from the Slip, but the balance must have been made by other artificial filling. Its shape would indicate that a part of it, at least, was formed by artificial filling. It is rectangular and the United States Government map of the Chicago Harbor, 1892, which shows this land as it now exists, shows also that the water a short distance north of the north line of this land at three points at varying distances from the Lake Shore Drive was 14.2, 16.6 and 18.4 feet in depth at each of these points, respectively. That considerable sand must have been deposited at these points and to the south between these points and the north line of Michigan Slip appears from the fact that the record of the soundings (as shown on the Hinman map of the Chicago Harbor) made in 1873, showed the depths of the water north of the North Pier to be from six to eight feet greater than in 1892; in other words, during approximately twenty years preceding 1893 six feet of sand had been brought in by the wind and waves and had raised the bed of the lake six feet higher. These soundings were taken some distance north of the North Pier, and it is fair to assume that just immediately

north of the pier more sand was deposited than further to the northward. Nevertheless, if we assume that a certain portion of this land was formed by accretion accelerated by the building of the north protection of the slip, still it is very clear that a large portion of this land was made by artificial filling; and such title or right as the Chicago Dock & Canal Company has to the lands must be found, if at all, in its charter.

I have viewed the land itself. Its surface is several feet above the water. It is for the most part free from buildings of any account except at the southwest corner near the Slip, where part of a warehouse is built. It is protected on the north and on the east by piling. Part of the land immediately on the north side of Michigan Slip is a protection to the Slip and can be used for the landing of vessels, but the east and north sides (while it is possible that they might be so used) ordinarily have not been so used, and these sides are not properly fitted for such use. No docks or piers have been built from the north or east sides of this land. If such docks or piers had been built, it might well be urged that it was necessary to reclaim this land in order to make a proper approach to the docks or piers.

There arises also the question of the intent and purpose of the Company in filling up so much of this land as has been reclaimed by artificial filling. If the reclamation was made by the Company with the bona fide intention at the time of making it a part of, or a necessary appurtenance to, any of the harbor structures authorized to be made by its charter, the Company might justify such reclamation. But it may well be urged as an answer to any such claim that for many years no step has been taken to utilize the north and east portions of the land for any purpose directly connected with or in aid of commerce and navigation.

As to such part of the shore lands north of the Michigan Slip as have been formed by accretions and as to that part adjacent to the Slip and used in connection therewith or as a protection thereto, the title is in the Chicago Dock & Canal Company as riparian owners, subject to the public uses and trusts heretofore mentioned. As to such part of this land as has been made by artificial filling, the title also is in the Chicago Dock & Canal Company, in case it shall appear that such filling was

made in pursuance of the construction of or in pursuance of a bona fide attempt or purpose to construct such harbor facilities as are authorized by its charter. If any part of such land was made for the purpose simply of making land as such or for any purpose other than to make a structure in aid of commerce or navigation, then the title to the same is now in the State of Illinois. The question of the title to this land, especially the north half, presents very intricate questions of fact, and its answer involves not only a determination of such questions, but also to a greater or less extent the purpose or intention of the Company in filling in the land. The information which I have been able to procure is not such as would justify me in expressing finally an opinion upon which I rightfully could expect any one to rely. Such an opinion must come from the courts. This much, however, seems clear and sufficient for the present purpose. The title of the Chicago Dock & Canal Company, at least to the north half of this land, is not free from cloud. The cloud on the Company's title is the claim which might be made by the State of Illinois. Under no circumstances should the City authorize the Chicago Dock & Canal Co. to build docks or piers from this land out into the lake without requiring proper safeguards as to the title, and without provision for deeds with full covenants of warranty of title in case the City should purchase the docks or piers. It also might be provided that the authority to erect and the erection of such docks or piers shall not be held to strengthen or confirm as against the City or the State any doubtful title which the Company may now have in the land. And the City should be given free hand, in case the State should establish any claim or title to the land or any part thereof, to secure from the State a grant of its title or claim.

In connection with the question of the title to the lands in question, I desire to call to your attention a Joint Resolution of the General Assembly adopted by the House of Representatives on May 17, 1909, and concurred in by the Senate on May 18, 1909. After several recitals the resolution reads as follows:

RESOLVED, BY THE HOUSE OF REPRESENTATIVES, THE SENATE CONCURRING HEREIN, That all privileges, rights, and easements used of water and land, as

well also all rights of property, real, personal and mixed, that can or may be asserted by said Company to the waters of Lake Michigan or to the soil under the same, whether it be to the present made land or easements in the same be and the same are hereby declared to be the property of the State of Illinois, and any license, privilege, easement, claim or franchise now outstanding in said Company to the waters and lands of Lake Michigan under or by virtue of its charter under the Act of 1857 creating it are each and all hereby declared forfeited, revoked and annulled; and it is further hereby declared that said Company shall, hereafter, possess no further rights or easements not enjoyed by the public, in and to the lands and waters of Lake Michigan.

Laws of Illinois 1909, pp. 478-9

Although the language of the Resolution is somewhat unusual, its evident intent is to declare a forfeiture of the rights of the Dock Company in and to its made lands on the Lake Shore and to revoke the license of the Company further to use or occupy the submerged lands.

The charter of the Company, as we have seen, was an Act of the General Assembly and constituted a contract between the State and the Company. The Act gave the incorporators the right or franchise to be a corporation and this right cannot be taken away, although it may be forfeited by non-user. Coupled with this right or franchise, a license was granted the Company to use and occupy submerged lands of the State for specified purposes. This license, in my opinion, stands on a different footing from the corporate franchise, and it may be revoked by Act of the General Assembly in so far as not exercised. When the license is rightfully exercised in accordance with the provision of its charter, the Company gains a vested right to use the submerged lands for or as appurtenant to structures in aid of navigation and commerce. And such rights cannot be taken away except for a public purpose and on payment of compensation.

A Joint Resolution is an expression of the legislative will on a matter usually of temporary interest. It does not have the style of laws, "Be it enacted," etc., as required by Art. 4, Sec.

11 of the Constitution, nor does it have a title in accordance with the provisions of Art. 4, Sec. 13 of the Constitution. It is not read at large on three different days in each house, as required by Article 4, Sec. 13 of the Constitution, nor is it approved and signed by the Governor as required by Article 5, Sec. 16 of the Constitution. Its passage is not attended with the formalities nor surrounded with the safeguards which attend and surround the passage of laws.

It is the law of this State that the General Assembly cannot repeal a law by a Joint Resolution.

The People v. Campbell, 3 Gilm., 466.

Burritt v. Commissioners of State Contracts, 120 Ill., 322.

And if a Joint Resolution were the proper method by which the General Assembly might express its will, it could not affect any right already vested in the Company. I am therefore of the opinion that this resolution does not affect the question of the title to the shore lands here under consideration.

There remains the question of the title to the ends of the following streets: Water, Michigan, Illinois and Indiana. As to Water Street and Michigan Street there is little difficulty. The east end of Michigan Street is at the west end of the Michigan Slip, and its title is in the City of Chicago subject to such use as may be made of it by The Chicago Dock & Canal Company under Section 12 of its charter, which will be discussed hereafter. The east end of Water Street is at the entrance to the Slip and it was dedicated by The Chicago Dock & Canal Company in its re-subdivision of a part of Kinzie's Addition to Chicago by plat dated March 16, 1885. The title to the east end of Illinois and Indiana Streets presents a somewhat more complicated question. As has been said, Kinzie's Addition to Chicago was platted in 1833. In this plat (the original record of which was burned in the Chicago fire) Illinois and Indiana Streets are shown as being opened through to the Lake and ending on the Lake Shore. By a plat dated March 16, 1885, and approved and recorded on March 17, of the same year, The Chicago Dock & Canal Company made a re-subdivision of the lands here in question. This re-subdivision also shows Illinois and Indiana Streets as ending at the Lake and it shows but one line of lots north of the north line of the

Michigan Slip and extending northward to the south line of Illinois Street extended.

By a plat dated August 31, 1889, approved September 4, and recorded September 17, of the same year, The Chicago Dock & Canal Company platted what is called the Peshtigo Dock Addition. This plat shows the rectangular piece of land north of Michigan Slip as it exists today. At the west end of the rectangle and about one thousand feet west of the water front (the eastern boundary of this land) there was dedicated a short street running from Illinois to Indiana Street and called Peshtigo Court and the plat shows Illinois and Indiana Streets as ending at the east line of Peshtigo Court. From an examination of these plats, one can reasonably infer that, by accretions and by filling, the shore line between the north line of Indiana Street and the north line of Michigan Slip was extended eastward from the Lake Shore as it is shown in The Chicago Dock & Canal Company's Plat of 1885, and that between 1885 and 1889 the land north of Illinois Street was made. Irrespective of the way in which the Lake Shore was projected eastward, it is clear that the City should not be deprived entirely of its riparian rights in its street ends and of its street ends themselves unless it should be judicially determined that the title to all the made land is in the State of Illinois, and the State should demand the removal of the land as a purpresture. It is unnecessary to discuss this question at greater length. I think it is sufficient to say that the right of the City in Indiana Street and Illinois Street as extended to the water front is just as good as and even better than the right of The Chicago Dock & Canal Company to the made land between the two streets. It is true that its charter gives to the Company broad powers with reference to streets. Section 12 of the charter is as follows:

"The said corporation shall have power to vacate the streets which pass through their own land, and shall have power to use and the right to appropriate, for their canals and other purposes, so much of the east ends of the several streets passing through so much of Kinzie's Addition to the City of Chicago as lies between the Lake Shore and the West line of the land formed by the accretion in said addition, and known as "The

sand": Provided, said corporation shall first purchase all the land on each side of any street, so far as they may use or appropriate the same."

Private Laws of Illinois, 1857, page 502.

The Company has never attempted to vacate Indiana or Illinois streets by any positive act shown by the public records, and I am of the opinion that Section 12 is to be interpreted as meaning that streets can be vacated only by positive act and in accordance with the provisions of the statutes. And I am of the opinion also that the power to use and the right to appropriate for its canals and other purposes the east ends of the streets as given by the charter of the Company does not take away from the City its title to the streets nor the right of the public to use them except in so far as such title or right necessarily may be abridged by the actual use and operation of the harbor structures of the Company.

As to the Shore lands north of Indiana Street and between Indiana and Ohio Streets, it appears that in 1891 a deed to those lands was given by Ogden and others to the Commissioners of Lincoln Park. This deed purported to convey to the Park Commissioners the title to the land occupied by the Lake Shore Drive between the center line of Erie Street extended and the north line of Indiana Street extended, together with all riparian rights. The conveyance was made upon the condition that when the Lake Shore Drive was fully completed it should be maintained as a part of Lincoln Park and forever used for the purposes of a boulevard or driveway and for no other purposes except for boat-houses for small row-boats and on the condition also that lands formed by accretion or otherwise should never be used for the erection of buildings thereon or for any purposes but those of a public park. In 1891 the Lincoln Park Commissioners deeded to Ogden and others the reclaimed land west of the Lake Shore Drive. These deeds were made in pursuance of a certain contract between the shore owners and the Commissioners of Lincoln Park made under and by virtue of an Act of the General Assembly entitled "An Act enabling Park Commissioners having control of any boulevard or driveway bordering upon any public water in this State to extend the same," approved June 4, 1889. The contract

apparently has not been fully carried out, for the Lake Shore Drive has not been improved south of Ohio Street, and as between the grantees of Ogden and the Park Commissioners it is very difficult to say precisely what the rights of each party are. However, it is very clear that until the rights of the parties are definitely determined by judicial proceedings, no one can safely build a dock or a pier on the submerged lands of the Lake between Indiana and Ohio Streets without securing the assent both of the Lincoln Park Commissioners and of Messrs. Londrigan and Sprague, who are grantees of Ogden.

For reference I attach hereto four plats. The first, marked "Plat A," shows the various extensions of the North Pier. The second, marked "Plat B," shows that portion of the water front from the mouth of the River north to Chicago Avenue. It is taken from maps in possession of the War Department of Chicago, and shows the way in which the shore line has advanced eastward from time to time, and how accretions apparently were accelerated by the building of the North Pier. It also shows the present location of the Michigan Slip and of the reclaimed land—the title to which is discussed in this opinion. The third plat, marked "Plat C," shows the same part of the water front as does "Plat B." It is taken largely from "The Geography of Chicago and its Environs" by Salisbury and Alden. The fourth plat, marked "Plat D," shows the street ends as shown on the plat of The Dock & Canal Company's Peshtigo Dock Addition. Plats A, C and D have been prepared by Mr. A. A. Righter, Engineer in the office of Mr. John M. Ewen, Harbor Commissioner. Plat B has been prepared by Mr. T. R. Gallant, in the office of Major Rees of the United States Army Engineers, in charge of the Harbor of Chicago.

In making this examination of titles I have not made a search for mortgages recorded prior to the last sub-division. I have not examined the claims (if any) of George W. Streeter, nor the claims of the representatives of the Indians based on the Treaty of 1795.

Respectfully submitted,

EDWIN H. CASSELS.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

POLICE POWER OF CITY OVER HARBORS, WHARVES, DOCKS, ETC.

JUNE 6, 1910.

HON. CHARLES M. FOELL, Chairman, Committee on Harbors, Wharves and Bridges, Chicago.

Dear Sir:

I submit herewith an opinion on certain questions stated in your letter addressed to me and dated June 3rd, 1910. The questions stated by you and the answers to the same are as follows:

FIRST: Should the Federal Government grant the permit applied for by the Chicago Dock & Canal Company, what consent, permission or authority, if any, would said Company have to obtain from the City of Chicago before it could legally proceed with actual construction work?

ANSWER: The police and regulatory power of the City of Chicago over harbors, wharves, docks, piers and other harbor structures as defined by the Cities and Villages Act, is almost plenary. While the Chicago Dock & Canal Company was organized and now exists under a special charter granted to it by the General Assembly of the State, nevertheless, in exercising its corporate franchises and rights and in carrying on its corporate business, it is subject to the police and regulatory powers of the City.

Under and by virtue of the police and regulatory powers in this respect granted to the City by the State, I am of the opinion that the City has the power to provide by ordinance that any one who desires to build a dock in the harbor must secure the consent of the City. There is now in force in the City a general ordinance (Section 998 of the Revised Municipal Code of Chicago of 1905) which provides that any person constructing a dock within the City shall secure a permit for such construction from the Department of Public Works. The permit granted by the Secretary of War is not intended to supplant lawful local regulations.

I am, therefore, of the opinion that if the Secretary of War should grant to the Chicago Dock & Canal Company a permit to build docks, nevertheless, before it lawfully could begin the actual work of construction, said Company would

have to secure a permit from the Department of Public Works of the City of Chicago in accordance with the terms of the Municipal Code.

SECOND: Did the Legislature of the State of Illinois, at the time it granted to said CHICAGO DOCK & CANAL COMPANY the charter under which it now seeks to exercise the rights in question, viz.: the building of piers in Lake Michigan immediately north of the mouth of the Chicago River, have the power to grant all the rights and privileges enumerated in and sought to be conferred by said charter?

ANSWER: The Chicago Dock & Canal Company was incorporated by a Special Act of the General Assembly passed in 1857 and amended in 1861. At that time the Constitution of 1848 was in force. Under that Constitution corporations might be created by special act where, "in the judgment of the general assembly," the objects of the corporation could not be attained under general laws. The judgment of the General Assembly on such a question would be final and would not be reviewed by the courts. The Constitution of a State does not grant power to the General Assembly; it limits legislative power. I find nothing in the Constitution of 1848 which prohibits the granting by the General Assembly of the rights, franchises and licenses enumerated in said Special Acts.

I am, therefore, of the opinion that the General Assembly had the power to pass the Special Acts incorporating the Chicago Dock & Canal Company and, subject to the limitations hereinafter stated, to grant to the Company the corporate rights, franchises and licenses therein enumerated.

It must be remembered, however, that certain rights or licenses enumerated in the charter of the Company are rights of a character different from the right or franchise to be a corporation. I refer especially to the right to use and occupy the submerged lands of the State and the right to exercise the power of eminent domain. The right or franchise to be a corporation is in terms perpetual. Such a right the General Assembly doubtless had the power to grant. But it did not have the power to grant to the Company beyond recall the right to use and occupy the submerged lands of the Lake which are public property, the title to which is held by the State in trust

for all the people of the State, nor did it have the power to grant beyond recall the right to exercise its sovereign power of eminent domain. These rights or licenses, in my opinion, in so far as not exercised by the Company, may be revoked by an act of the General Assembly.

THIRD: What is the legal effect of House Joint Resolution No. 28 adopted by the House of the Illinois State Legislature May 17th, 1909, and concurred in by the Senate May 18th, 1909, which by its language declares certain rights conferred upon said CHICAGO DOCK & CANAL COMPANY by the Act of 1857 forfeited, revoked and annulled.

ANSWER: House Joint Resolution No. 28, by its terms, declared a forfeiture of the rights of the Company in and to its made lands and revoked the right or license of the Company further to occupy the submerged lands of Lake Michigan. The general rule is that an act of the General Assembly cannot be repealed or amended by a joint resolution. The rights which the Company has under its charter could not have been granted to it by a joint resolution, and in my opinion those rights, whatever they may be, cannot be taken away by a joint resolution. Clearly such resolution cannot work a forfeiture of rights already vested. As to the effect of the resolution on rights not exercised by the Company at the time of its passage, there might be a difference of opinion.

FOURTH: Have any of the rights acquired by said CHICAGO DOCK & CANAL COMPANY under said charter been lost by lapse of time, non-user, or for any other reason?

ANSWER: It is well settled law that the rights and franchises of a corporation my be forfeited by non-user or by misuser. But it is not every non-user or mis-user of corporate rights or franchises that will work such forfeiture. And in the case of a wrongful user of its powers, a corporation does not necessarily forfeit its corporate franchise, it may only lose the power or right which it has wrongfully used. A corporation must use its corporate franchise and actively carry on its corporate business if it desires to keep its charter, but it is not obliged to exercise all the powers granted to it by its charter.

The charter of the Chicago Dock & Canal Company purports to confer broad powers. It provides, among other things,

that the Company may construct wharves, docks, moles, piers and breakwaters, and maintain canals, basins, slips and other similar harbor improvements. The Company has not exercised all of these powers but it has exercised some of them. I find that the most important harbor work which the Company has constructed and maintained is the Michigan Slip. Plans for this Slip were presented by the Company to the Chief of Engineers of the United States Army in 1867 and were by him approved. Shortly thereafter the work of construction was commenced and the Slip was completed about 1871. Since then, from time to time, it has been enlarged and partially rebuilt. Today the Slip is shown by the maps to be about 2,500 feet long, and of varying width, averaging about 100 feet with an entrance basin about 300 feet wide. The Company has erected a protecting pier to the east; it has filled in considerable adjoining submerged land, and has maintained dockage around and about the Slip, together with protecting structures. It also no doubt has carried on other business in connection with its lands and the buildings thereon, but the Michigan Slip and its appurtenances are substantially all the harbor work done by the Company. The work already done, however, is not inconsiderable and the Company professes to be willing to make further improvements, and the question is whether or not it can be said that as a matter of fact the Company has failed to exercise the powers granted to it by the General Assembly to such a degree that the courts would declare a forfeiture of its corporate franchise for non-user. I am of the opinion that the courts would not so declare. I have been able to find no adjudicated case where the courts have gone so far.

Whether the Company might be ousted from its right further to use and occupy the submerged lands of the Lake, is a different question. The Company has used and occupied a comparatively large tract of the submerged land, possibly more rather than less than was necessary for harbor work already done. For forty years it has been using and occupying the submerged lands for the dockage and protection around Michigan Slip. It cannot, therefore, it seems to me, be said to have lost its rights by non-user. If the law is as has been stated then

the question of whether the Company shall occupy more of the submerged land is for the General Assembly.

There remains another matter to be considered here. In filling in the made land north of the Michigan Slip, there is a serious question as to whether or not the Company has not reclaimed more of the submerged land than was necessary properly to carry out such harbor improvement as up to the present time has been made. If the filling in of this land was unlawful the title to the land is in the State of Illinois. The question of the title of this land involves difficult questions of fact as to how and why it was made. If the title is not in the Company, but in the State, then the Company would have to acquire from the State the title which carried with it the littoral rights before it could build piers in front of the land.

FIFTH: What would be the proper form of legal procedure to pursue to have all the questions suggested by the foregoing queries most promptly and fully adjudicated by the courts, and by whom should such procedure be instituted?

ANSWER: Action on the part of the Company would be necessary in order to secure a judicial determination of the question as to whether the Company must obtain from the City a permit before it begins the construction of docks. If the Company should begin the work of construction without securing a permit, it would be the duty of the proper official under the Municipal Code to stop the work, whereupon the Company might file a bill in chancery to enjoin interference by the City with its work of construction. In such a suit it would be necessary to determine whether or not the permit is necessary.

The questions raised in your second, third and fourth inquiries can be adjudicated in actions instituted by the Attorney General or the State's Attorney for and in behalf of the People of the State of Illinois.

Respectfully submitted,

EDWARD J. BRUNDAGE,

Corporation Counsel.

In re RELATION OF THE BOARD OF DIRECTORS OF THE CHICAGO MUNICIPAL TUBERCULOSIS SANITARIUM TO CITY DEPARTMENTS AND THE POWER AND AUTHORITY OF SAID BOARD OF DIRECTORS.

NOVEMBER 2, 1910.

HON. HARLOW HIGINBOTHAM, President, Chicago Municipal Tuberculosis Sanitarium, 411-158 Adams Street, Chicago.

Dear Sir:

Your letter of the 28th ult. in which you ask a number of questions as to the relation of the Board of Directors of the Chicago Municipal Tuberculosis Sanitarium to the City departments, as to the legal power and authority of the Board with respect to the control and disposition of the funds of the sanitarium, and as to whether or not the employes of said sanitarium are subject to the conditions of the City civil service, has been referred to me, and in reply I beg to say:

A. While the Chicago Municipal Tuberculosis Sanitarium is not, strictly speaking, a City department, it is connected with, dependent upon, and to some extent a part of the municipal government of the City. It resembles the Board of Education in some respects, but its legal status is almost exactly that of the Chicago Public Library. The Municipal Tuberculosis Sanitarium Act is modeled very closely after the Public Library Act.

B. (1) Section 6 of the Municipal Tuberculosis Sanitarium Act is as follows:

"They (the directors) shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the sanitarium as may be expedient, not inconsistent with this act, and the ordinances of such city or village. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the 'Tuberculosis Sanitarium Fund' and of the construction of any sanitarium building and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose: *Provided,* That all moneys received for such sanitarium shall be deposited in the treasury of such village or city to the credit of the 'Tuberculosis Sanitarium Fund,' and shall not be used for any other

purpose and shall be drawn upon by the proper officers of said city or village upon the properly authenticated vouchers of the sanitarium board."

In my opinion, under that part of the section above quoted, the Comptroller has no power to control the expenditures of the Board of Directors. He is the chief auditing and accounting officer of the City and it is his duty to see that the vouchers are correct in form and for the correct amounts, but he has no right to refuse his approval, unless he believes the expenditure is one which the Board has no legal power or authority to make and which, therefore, would make him liable upon his bond. With the policy of the Board of Directors or the necessity or propriety of the expenditures he has nothing to say.

(2) In my opinion, it is the duty of the Board of Directors to conform to the methods required by the City Comptroller in the matter of the payrolls of the sanitarium, and the employes of the sanitarium must be paid through the City Paymaster as other City employes are paid.

(3) The Board of Directors are not required to purchase supplies through the City Purchasing Agent.

(4) Vouchers properly authenticated by your Board must pass through the proper City auditing department for the purpose of checking and accounting. The Comptroller has no right to hold up a voucher properly authenticated by the Board of Directors because in his judgment it is not proper. He could do this only if, in his judgment, such expenditure, and his payment on account thereof, would be beyond the power of the Board of Directors, or in other words, would be illegal.

(5) In my opinion, the Board of Directors has the right, power and authority to arrange and distribute the fund under your control according to the best judgment and discretion of the Board, and, therefore, may decide how much of such fund may be used respectively for construction, operation, maintenance, supplies and salaries without the advice or direction of any City official or of the City Council.

(6) The question whether or not the employes of the sanitarium are subject to the conditions of the City Civil Service Act is not free from doubt. Section 6 of the Sanitarium Act is in part as follows:

"Said Board shall have the power to purchase or lease ground, and to occupy, lease or erect an appropriate building or buildings for the use of said sanitarium by and with the approval of the City Council or Board of Trustees, as the case may be; shall have the power to appoint a suitable superintendent or matron, or both, and all necessary assistants, and fix their compensation, and shall also have power to remove such appointees."

The language just quoted is almost exactly identical with the language of the Public Library Act, which, however, was passed previous to the passage of the City Civil Service Act. The employes of the Library are now qualified, appointed and removed in accordance with the City Civil Service Act. The Municipal Tuberculosis Sanitarium Act has been passed since the City Civil Service Act. The clerks and bailiffs provided for by the Municipal Court Act have been held not to be subject to the provisions of the City Civil Service Act.

McGann v. People, 227 Ill., 567.

However, the language of the Municipal Court Act as to the appointment and removal of clerks and bailiffs is quite different from that used in the Municipal Tuberculosis Sanitarium Act. It seems probable that the courts would hold that the provisions of the Sanitarium Act are not in conflict with the Civil Service Act and that the appointment and the removal of the employes of the sanitarium are to be made by the Board of Directors, under and in accordance with the City Civil Service Act.

In view of the fact that the work of the sanitarium should be promoted and more efficiently carried on, by employes who have qualified under a careful and proper examination of their fitness for the work required of them, I believe the doubt should be resolved in favor of the Civil Service, and that, therefore, the Board of Directors should secure their employes through the City Civil Service Commission.

Yours very truly,

CLARENCE N. BOORD,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE.

In re AS TO WHETHER FUNDS DERIVED FROM TAX ON VEHICLES CAN BE USED FOR SPRINKLING AND OILING OF STREETS.

CHICAGO, NOVEMBER 26, 1910.

HON. CHAS. M. FOELL, Chairman, Committee on Finance.

Dear Sir:

Your communication of the 22nd inst. addressed to Hon. Edward J. Brundage, Corporation Counsel, wherein you ask for an opinion from this department "as to the right of the City to use a portion of the vehicle tax fund for sprinkling and oiling the public streets, as well as repairing the same," has been referred to the writer for reply.

The grant of power under which this fund is raised is contained in Clause 96 of Article V of Chapter 24 (Cities, Villages and Towns Act), Hurd's Revised Statutes, 1909, which reads as follows:

"To direct, license and control all wagons and other vehicles conveying loads within the City, or any particular class of such wagons and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expense of street or alley improvement or repair."

In pursuance of the above grant the City Council on February 3, 1908 (Supplement III to Code, pp. 376-377), passed an ordinance wherein it was provided that:

"All of the revenues derived from such license fees shall be kept as a separate fund and used only for paying the cost and expense of street or alley improvement or repair."

Subsequent amendments having no bearing upon the subject in question when adopted April 26, 1909 (C. P., p. 158), and January 10, 1910 (C. P., p. 2572), but on June 27, 1910 (C. P., pp. 943-944), the original ordinance of February 3, 1908, was amended and it was provided in Section 2 of said amended ordinance "that the revenues derived from such license fees shall be used for the *repair* of streets and alleys."

The Century Dictionary defines the noun "repair":

"1. Restoration to a sound or good state after decay, injury or partial destruction; supply of loss; reparation.

"2. Good or sound condition kept up by repairing as required."

Under the definition of "repair," under the second subdivision, if there is any kind or class of pavement under the jurisdiction of the City upon which, at any time during the life thereof, oil would have the effect of preserving it and preventing it from falling into disrepair and would thereby extend the life of the pavement, and such oiling could be economically done, I do not think there is any doubt but that such oiling could be considered as a repair of such pavement. If the primary purpose of such oiling could fairly be said to be the preservation of such pavement in its integrity and to prevent the disintegration thereof, I would consider that such oiling could properly be considered a repair of such pavement and could be paid out of the vehicle tax fund; but if the primary purpose of such oiling were to lay the dust on the pavement for the convenience of the public and such oiling would not to any appreciable extent preserve or lengthen the life of that particular pavement, I do not think as to such pavements the oiling thereof could be classed as a repair.

With reference to the sprinkling of pavements with water, if you have in the City any pavement the ingredients of which are such that the application of water thereto, at any time during the life thereof, would have the effect of preserving or extending the life thereof to an appreciable extent, I think that as to such pavements the same rule above laid down as to the oiling of pavements would apply, and I am also clearly of the opinion that if the object of the sprinkling was the settling of the dust thereon for the convenience of abutting owners and the general public that in the latter event it could in no way be considered a repair of the pavement and could not therefore be paid out of the vehicle tax fund.

I further beg to advise you that on May 5, 1910, Mr. W. D. Barge of this department, in a communication addressed to Hon. B. W. Snow, Chairman of the Committee on Finance, stated as his opinion that the oiling of macadam streets was

either an improvement or repair of the street, and therefore the funds derived from the wheel tax fund could be used for that purpose.

Yours respectfully,
OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 6, 1910.

In re POWER OF THE BOARD OF DIRECTORS OF THE CHICAGO MUNICIPAL TUBERCULOSIS SANITARIUM TO EXTEND SUPPLEMENTARY RELIEF TO CONSUMPTIVES IN THEIR HOMES.

HON. H. N. HIGINBOTHAM, President, Chicago Municipal Tuberculosis Sanitarium, 411 Rand-McNally Bldg., City.

Dear Sir:

Your letter of the 2nd inst., addressed to the Corporation Counsel, in which you inquire concerning the power of the Board of Directors of the Chicago Municipal Tuberculosis Sanitarium to furnish equipment for outdoor treatment and nourishing food to indigent tuberculosis patients at their homes, has been referred to me, and in reply permit me to say:

I have made a very careful study of the Municipal Tuberculosis Sanitarium Act with reference to your questions, and have come to the conclusion that the power to furnish such equipment and food to such patients must be denied. It is plain that the legislature intended to authorize the establishment of a sanitarium at some particular place or particular places and the treatment, care and nursing of persons suffering from tuberculosis at such place or places. This intention, in my opinion, excludes any intention to extend the treatment, care and the furnishing of food to patients in their homes.

It is no doubt true that a portion of the Tuberculosis Sanitarium Fund might be well spent in furnishing facilities and food for fighting tuberculosis in the homes of the patients, and that better results might thus be secured for less money than in any other way, but this does not alter the legal phase of the question, and until the legislature authorizes the expenditure of such

fund in the homes of such patients, I am of the opinion that such expenditure cannot be legally justified.

Very respectfully yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JANUARY 23, 1911.

In re CITY'S POWER TO CONDEMN A SITE FOR TUBERCULOSIS SANITARIUM.

HON. CHARLES M. FOELL, Chairman, Committee on Finance.

Dear Sir:

We have your letter concerning the proposition submitted by the Trustees of the Tuberculosis Sanitarium, in which you ask to be advised whether or not the Trustees have the right to obtain property by condemnation.

The Act of May 18, 1905, amending the general city and village act by adding thereto certain provisions applicable to the City of Chicago only, expressly authorizes the city to

"Exercise the right of eminent domain by condemnation proceedings . . . for the acquirement of property useful, advantageous or desirable for municipal purposes."

The Act of March 12, 1909, amending the Tuberculosis Sanitarium Act of March 7, 1908, provides

"That the city council of cities, and boards of trustees in villages of this state, shall have the power, in the manner hereinafter provided, to establish and maintain a public sanitarium for the use and benefits of all inhabitants of such city or village, for the treatment and care of persons afflicted with tuberculosis."

Under these statutes the City Council has power to condemn land for a site for a Tuberculosis Sanitarium. The Trustees of the Sanitarium have no such power.

Very truly yours,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

APRIL 25, 1910.

In re STAIRWAYS IN BUILDINGS ERECTED PRIOR TO THE PASSAGE OF THE TENEMENT HOUSE ORDINANCE—CLASS 6 BUILDINGS.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

Answering your letter to Edward J. Brundage, Corporation Counsel, requesting an opinion as to whether tenement houses, Class VI buildings, erected prior to the passage of the present building ordinance, which are two and three stories in height, with only one means of exit, should be required to provide an additional means of exit, I beg leave to state that Section 395 of the Revised Municipal Code of Chicago of 1905 provides—

"Every now existing and every new tenement house shall have at least two flights of stairs, which shall extend from the entrance floor to the top story. Such stairs and the public halls in every tenement house shall each be at least three feet wide in the clear, and every apartment shall be directly accessible from both such flights of stairs. If any existing tenement house be so altered as to increase the number of apartments therein, or if such building be increased in height, or if the halls and stairs therein be damaged by fire or otherwise to an extent greater than one-half the original cost thereof, the entrance, stair halls, entrance halls and other public halls of the whole building shall be made to conform to the requirements of this chapter as to new tenement houses."

This section above quoted requires that every now existing and every new tenement house shall have at least two flights of stairs not less than three feet wide which shall extend from the entrance floor to the top story, but this section must be construed jointly with other sections of the building ordinance, all of which were passed on March 20, 1905, as a part of the Revised Municipal Code of Chicago.

Section 446 also appears as a part of the requirements for Class VI buildings, and is as follows:

"Nothing in this chapter contained shall be considered as requiring alterations in the construction or equipment of buildings in existence at the time of the passage of this ordinance, and which at the time of their construction were built in com-

pliance with the ordinances then in force, unless such building shall not have sufficient or adequate means of egress therefrom or ingress thereto by reason of insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress."

By this section last above quoted these ordinances do not require changes in the construction or equipment of buildings which at the time of their construction were built in compliance with the ordinances then in force, unless such building shall not have sufficient or adequate means of egress therefrom or ingress thereto by reason of insufficient or inadequate elevators or elevator equipment, etc.

The first paragraph of Section 634 of the Revised Municipal Code of Chicago of 1905, as amended February 3, 1908, containing requirements in regard to the alteration of existing buildings, is the same as the first paragraph of Section 446 last above quoted. The second paragraph of Section 634, however, provides that where a building "has inadequate or insufficient means of egress therefrom or ingress thereto" the Commissioner of Buildings shall notify the owner, agent or person in charge, control or possession of such building of such fact and direct him forthwith to make such alterations and changes in the construction of such building as are necessary to be made in order to promote the safety of the occupants of such building, of the persons using the same and of the public.

Construing Section 395, as modified, with Sections 446 and 634, in my opinion, the intent of the city council was to require additional stairways or means of exit in buildings erected prior to the passage of this ordinance only in those cases where the building in question shall have insufficient or inadequate means of egress therefrom by reason of not having sufficient or adequate stairways or stairways improperly located or fire escapes or other means of exit.

In one of the cases you mention where there are two apartments on the second floor with only one exit and that being a stairway in the center of the building, in my opinion, you should require an additional means of exit—either a stairway or a stair fire-escape. In another instance you mention, where the build-

ings are three stories in height and are owned by the Pullman Company and only have one means of exit, in my opinion, you should require an additional means of exit. While such buildings are not, under the ordinance, required to be equipped with a fire-escape, yet, in my opinion, you may permit the erection of a fire-escape or stairway in the rear of the building in lieu of an interior stairway.

In determining whether or not you should require additional means of exit, the height of building, the location of the exit stairway and the number of occupants should be taken into consideration, and, in my opinion, you should not require an additional exit in an ordinary two-story flat building, but should require more than one means of exit in a three-story flat or apartment building.

Respectfully submitted,
WILLIAM S. STAHL,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

MARCH 21, 1910.

In re EFFECT OF A MAJORITY VOTE OF "NO" UPON QUESTION: "SHALL THIS CITY BECOME ANTI-SALOON TERRITORY?" UPON PROHIBITION DISTRICTS.

HON. ANTON J. CERMAK, Alderman of the Twelfth Ward.

Dear Sir:

Your inquiry as to what will be the effect upon the prohibition or dry territory now within the city if a majority of the voters in the coming election shall vote "no" upon the proposition: "Shall this city become Anti-Saloon Territory?" has been referred to me, and in reply I beg to say:

I have made a careful examination of the Act of May 16, 1907, which authorizes and provides for the creation by popular vote of anti-saloon territory. The question to be submitted under this Act is whether the city, *as a whole,* shall become "anti-saloon" or "dry" territory, not whether the city, as a whole, shall become "saloon" or "wet" territory. In other words, those who

vote "no," vote against the one proposition and not in favor of any other proposition. Section 8 of the said Act provides in part as follows:

"In all Anti-Saloon Territory during the time that it continues to be Anti-Saloon Territory, the operation of all ordinances providing for the restriction, regulation or prohibition of the sale of intoxicating liquor or for the issuing of dramshop licenses within any portion or the whole of such territory, so far as inconsistent with its status as Anti-Saloon Territory, shall be suspended."

Section 9 of said Act, after providing for a submission to the voters of the proposition: "Shall this city continue to be Anti-Saloon Territory?" continues as follows:

" . . . If a majority of the legal voters voting upon such last mentioned proposition in any such political subdivision or district vote 'No,' such political subdivision shall cease to be Anti-Saloon Territory, and all ordinances providing for the restriction, regulation or prohibition of the sale of intoxicating liquors or for the issuing of dramshop licenses, the operation of which was in anywise suspended within such political subdivision or district by virtue of the vote therein to become Anti-Saloon Territory, and with all additions and amendments which in the meantime may have been made thereto, shall, if not in the meantime repealed, become and be in force within said political subdivision or district to the same extent, only, however, as the same would then be in force had such political subdivision or district never become Anti-Saloon Territory."

From a consideration of these sections it is plain that if a majority of the voters should vote "Yes" on the proposition at the coming election, the prohibition ordinances would be suspended until a majority of the voters at a subsequent election should vote "No" upon the proposition: "Shall this city *continue* to be Anti-Saloon Territory?" at which time the prohibition ordinances would again be in force and effect.

It is my opinion, therefore, that if a majority of the voters at the coming city election vote "No" upon the said proposition,

it will not affect in any manner the prohibition districts now existing within the city.

Very respectfully,
CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re TIME FOR WHICH CONTRACTS FOR SUPPLIES MAY BE EXTENDED BEYOND THE FISCAL YEAR.

FEBRUARY 15, 1910.

HON. B. W. SNOW, Alderman Seventh Ward.

Dear Sir:

We acknowledge your verbal inquiry as to the length of time for which a municipal contract for supplies can, under the statutes and ordinances, be extended in its operation beyond the close of the fiscal year in which it was let.

In considering this question it is necessary, first, to examine Section 4, Article 7, of the Cities and Villages Act, which is as follows:

"4. No contract shall be hereafter made by the City Council or Board of Trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

The exception provided for as noted in the last line is with reference to emergency appropriations made necessary by casualties or accidents.

Further light is thrown upon the meaning of Section 4, as quoted, by Section 208 of the Criminal Code, which provides that any official (State, County or Municipal) who shall be guilty of contracting for the expenditure of a greater sum than was, at the time of so contracting, appropriated may be fined and removed from office.

In connection with the above it will be noted that it is not

customary for the council to appropriate funds for the purchase of supplies after the close of the current fiscal year, nor does the statute contemplate such a practice. Only in the case of contracts for extensive construction work or for the supply of water or light to the City for a term of years is there any reason or authority for incurring expense beyond the current year.

In accordance with the foregoing this department recommended and the City Council, on December 13th last (p. 2105), passed an amendment to Section 1847 of the Code of 1905, which amendment on its face applies only to the Department of Public Works, but by reference thereto in other sections indicates the manner in which all City contracts for supplies shall be made. The amended Section 1847 concludes as follows:

" . . . No contract for materials or supplies shall be let for a period extending beyond the end of the current fiscal year; but in cases where the said commissioner shall deem it necessary for the administration of the said Department of Public Works, the right or option may be reserved to the City of Chicago in any such contract to extend the operation of the same for a further period of not to exceed ninety (90) days, such right or option to be exercised by the City Council."

The provision for extending the operation of contracts beyond the end of the fiscal year by the action of the City Council was inserted in view of the decision in *City of Danville v. Danville Water Co.*, 180 Ill., 233, in which the Supreme Court have construed Section 4, Article 7 of the Charter, first above quoted, in the following language:

" . . . Within that period of first quarter of the fiscal year which may ensue prior to the passage of an annual appropriation bill or ordinance, the *City Council* may enter into any contract and incur any expense not otherwise unlawful without an appropriation therefor having been previously made, but may include the appropriation therefor in the general appropriation bill to be thereafter enacted within the said first quarter of the fiscal year. Section 4 has the effect to prohibit the incurring of liability or expense during the fiscal year after the passage of the annual appropriation bill unless the object of the expenditure or liability shall have been included within the

annual appropriation ordinance, except as to expenditures the necessity whereof is caused by some casualty or accident, within the meaning of the proviso to Section 3 of the Act."

The period for which contracts may be extended by the City Council was limited in the ordinance to ninety days because the council is required by law to pass its yearly appropriation bill within the first quarter, at the end of which time it is therefore possible and, as we believe, in most cases customary for the heads of departments to advertise for proposals and let new contracts. Furthermore it has not, so far as we are aware, in the practice of the council to thus incur expense without advertising for any longer period than that in which the administrative officers of the City are themselves without authority to advertise and award contracts in the usual manner.

Aside from the section of the Code above referred to, we do not know of any legal reason why a contract for supplies ending December 31st should not reserve the right to the City, to be exercised by the council, to extend its operation for any part of the ensuing year. Such an extension is, so far as the City is concerned, equivalent to the making of a new contract. But if, to use the language already quoted from the decision in the Danville Water case, the City Council can, before the passage of the appropriation, enter into *any* contract not otherwise unlawful, and include the same in the appropriation bill to be thereafter enacted, we cannot see why the period for which such contract is to run should not be the longest time for which such subsequent appropriation is made.

It is on account only of the language of that decision and of Section 208 of the Criminal Code above referred to that we think the responsibility of thus incurring expense without an appropriation should be assumed by the council rather than by an officer of the City.

In conclusion, it may be observed that the practice of extending contracts after December 31st by a council order has been and is recommended in order to conform strictly to the limitations of the present charter. Its purpose is simply to enable the City to obtain necessary supplies at a time when it would seem that they cannot be lawfully contracted for in any other way. It must be unsatisfactory to the contractor, since

he has no certain knowledge when he executes the contract of the length of time it is to remain in force or of the quantity of material he will be called upon to furnish, and the longer the period of extension is made, the greater is this uncertainty. If it is found that, on the whole, the best prices can be obtained about the first of July, and it is desired to let annual contracts for supplies at that time rather than about the first of April as at present, we consider this another argument in favor of changing the commencement of the fiscal year from January 1st to April 1st, or even to a later date.

Yours respectfully,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

In re RESOLUTION DIRECTING THE CHIEF OF POLICE TO REMOVE POLICE OFFICERS FROM PUBLIC AUTOMOBILES AND THE LEGAL EFFECT OF SUCH REMOVAL.

JUNE 15, 1910.

HON. JOSEPH T. MAHONEY, Alderman Thirtieth Ward.

Dear Sir:

Your letter of June 14th, addressed to the Corporation Counsel, asking "whether a resolution directing the Chief of Police to remove the police officers from the public automobiles operated by 'non-union companies' would be legal and the possible legal effect of the removal of the officers," has been referred to me, and in reply I beg to say:

The Mayor, as the chief executive of the City, is charged by statute with the performance of duties prescribed by law or City ordinances, and with the faithful execution of such laws and ordinances. (Sec. 10, Art. 2, Chap. 24, R. S. of Illinois.) In order to perform such duties and to execute and enforce the laws and ordinances, the Mayor is authorized to exercise, within the city limits, the powers conferred upon sheriffs to suppress disorder and keep the peace. (Sec. 8, Art. 2, Cap. 24, R. S. of Illinois.) In addition to this, the Mayor has the power to call on every male inhabitant of the City over eighteen years of

age to aid in enforcing the laws and ordinances, and to call out the militia to aid in suppressing riots and other disorderly conduct or carrying into effect any law or ordinance, subject to the authority of the Governor as Commander in Chief of the militia. (Sec. 13, Art. 2, Chap. 24, R. S. of Illinois.)

Chapter 125 of the Revised Statutes of Illinois, respecting sheriffs, contains the following clause:

"Each sheriff shall be a conservator of the peace in his county, and shall keep the same, suppress riots, routs, affrays, fighting, breaches of the peace, and prevent crime; and may arrest offenders on view and cause them to be brought before proper magistrates for trial or examination."

The Superintendent of Police is the right arm of the Mayor in the preservation of the peace and the enforcement of the law. Under the statute he is possessed of the power and authority of a constable at common law and under the statutes of the State. (Sec. 2, Art. 6, Chap. 24, R. S. of Illinois.)

Section 340 of the Criminal Code (Chap. 38, R. S. of Illinois) is as follows:

"It shall be the duty of every sheriff, coroner, constable, and every marshal, policeman or other officer of any incorporated city or village, having the power of a sheriff or a constable, when any criminal offense or breach of the peace is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts to him lawfully directed."

Sections 1737 and 1738 of the Revised Municipal Code of Chicago of 1905, which relate to the duties of the Superintendent of Police, are as follows:

1737. "DUTY TO PRESERVE PEACE, etc.] He shall devote his whole time to the municipal affairs of the City, to preserve the peace, order, safety and cleanliness thereof, and to this end he shall execute and enforce all ordinances and orders of the City Council, and the orders of the Mayor."

1738. "DUTY TO PROTECT PERSONS AND PROPERTY.] He shall be charged with the duty of protecting the

rights of persons and property, providing a proper police force at every fire, protecting strangers and travelers at steamboat landings and railway stations, and causing to be enforced all ordinances of the City."

The Mayor and Superintendent of Police have each subscribed to an oath to support the constitutions of the United States and of Illinois, and to faithfully discharge the duties of their respective offices according to the best of their respective abilities, and have given bonds to the City for the faithful performance and discharge of their duties.

From a consideration of the foregoing it is clear that the Mayor and Superintendent of Police not only have the power, but it is their duty to use all reasonable means within their power for the preservation of the peace and protection of property, and for this purpose to make any lawful use of the police force in the preservation of peace and the protection of property which will tend to accomplish that result. This power is conferred and a duty is imposed by the statutes of the State. If the Mayor and the Chief of Police, in the discharge of their duty to preserve the peace and to protect property, deem it necessary to place members of the police force upon the public automobiles using the public streets of the city, they have the power to so use the police force and to continue such use as long as they may deem it necessary.

The council, undoubtedly, have the power to pass the resolution you suggest, but in view of the foregoing, notwithstanding the passage of such a resolution, the Mayor and Chief of Police have the power, and it would be their duty to disregard the resolution if they believe that such use of the police force is necessary for the preservation of the peace and the protection of property. In other words, the resolution would have no binding force or effect.

In answer to your inquiry as to the possible legal effect of the removal of the officers from the public automobiles I would say:

Section 256a of Chap. 38, R. S. of Illinois, provides: "that whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons,

the City . . . shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

If, by reason of withdrawing the police from the automobiles, a mob or riot should result and property should be damaged thereby, the City would be liable under the above quoted statute for three-fourths of such damages.

In answer to your question as to whether it is legal for the City of Chicago to permit its police officers to be carried to points outside the city limits, I would say that while such police officers have no police power outside the city limits, it is not, in my opinion, illegal for the City to allow such officers to pass, temporarily, beyond the city limits with the automobiles which they have been ordered to protect.

Very respectfully,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

In re LIABILITY OF CITY TO BEAR EXPENSE OF RE-ENFORCING BRIDGE ACROSS THE WEST FORK OF THE SOUTH BRANCH OF THE CHICAGO RIVER AT WESTERN AVE. IN ORDER THAT THE CHICAGO RAILWAYS CO. MAY ESTABLISH THROUGH ROUTES AT THAT POINT.

OCTOBER 28, 1910.

B. J. MULLANEY, ESQ., Commissioner of Public Works.

Dear Sir:

Replying by direction of the Corporation Counsel to your inquiry of October 27th relative to the liability of the city to bear the expense of re-enforcing or strengthening the bridge crossing the west fork of the south branch of the Chicago river at Western avenue in order that the Chicago Railways Company may operate through routes at that point, I beg to advise you as follows:

I assume, in answering your inquiry, that the company is operating no cars across the bridge in question at the present time, and such being the case, I am of the opinion that under

the terms of the ordinance referred to in your communication the city may not require the Railways Company to operate through routes at the point in question until it either furnishes or causes to be furnished a bridge adequate to carry the cars operated on such through routes across the river at the point in question.

I am further of the opinion, however, that the Railways Company cannot by announcing that it desires to establish a through route at the point in question, compel the city to furnish or cause to be furnished an adequate bridge at the point in question; or, to state the proposition another way: the option is that of the city and not that of the Railways Company.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

In re POWER OF CITY TO REQUIRE "LOOP" COMPANIES TO PROVIDE SEATS FOR THE ACCOMMODATION OF PATRONS UPON SAID PLATFORMS.

JULY 16, 1910.

To the Honorable, the City Council of the City of Chicago.

Gentlemen:

The Corporation Counsel has directed me, in compliance with an order passed by your Honorable Body on July 14, 1910, to render an opinion as to the power of the city to compel the elevated railroad company operating and maintaining the structure commonly known as the "Union Loop" to furnish seats or benches on said structure for the accommodation of passengers using the elevated railroad trains.

Said "Union Loop" was constructed under and by virtue of authority granted in certain ordinances to the following elevated railroad companies:

(a) Lake Street Elevated Railroad Company; passed October 1, 1894.

(b) Northwestern Elevated Railroad Company; passed

June 24, 1895, which was an amendment of the original ordinance of January 8, 1894.

(c) Union Elevated Railroad Company; passed October 14, 1895.

(d) Union Consolidated Elevated Railway Company; passed June 29, 1896.

The rights and assets of the aforesaid companies have been transferred to the Northwestern Elevated Railroad Company, which now claims to own the "Loop." This company has succeeded not only to the rights and privileges contained in said ordinances, but also to all duties and obligations imposed therein, as well as to such duties and obligations as may be imposed by other laws and ordinances.

All of the ordinances above specifically referred to contain substantially the same provisions with reference to the use and maintenance of stations and platforms. These provisions, quoting from Section 6 of the ordinance to the Lake Street Elevated Railroad Company, are as follows:

"The said company is further granted permission and authority to construct and maintain over the streets, avenues and alleys or portions thereof, over, upon, along and across which its said elevated railroad is to be permitted to be constructed, as aforesaid, all necessary or proper stations and platforms and connect the same with said streets, avenues and alleys by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers, but such platform stations, stairs, stairways, elevators and landing places shall be so constructed and maintained as not to unnecessarily impair the use of such streets, avenues, alleys, or any approaches thereof."

In addition to the aforesaid provisions, the ordinances to the Lake Street Elevated Railroad Company and the Northwestern Elevated Railroad Company contain the following provisions:

"The platforms of all such stations shall be free from obstructions or projections of any kind . . ."

It will be seen at once that said ordinances contain no express provisions relative to the seating of passengers on the station platforms.

An elevated railroad company cannot be regarded as a mere

private enterprise, since it is affected with a public interest, but must be regarded as a public or *quasi*-public enterprise over which the city, as the agency of the State, can exercise a large measure of control.

Clause 66 of Section 1, Article V, of the Act for the Incorporation of Cities and Villages, provides that the city council shall have power—

"To regulate the police of the city . . . and pass and enforce all necessary police ordinances."

Under the power thus conferred, the city council may pass and enforce all such ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public.

It is a matter of common knowledge that the present seating accommodations provided for patrons of the elevated trains on the "Loop" stations are inadequate and insufficient, and I am, therefore, of the opinion that the city council, in the absence of any restriction contained in the ordinances above referred to, and in the interest of public health, comfort and welfare, has the power to compel the public service company or companies operating and maintaining said "Loop" structure to provide such seating accommodations on the platforms of said structure as will adequately answer the public need.

Should said Northwestern Elevated Railroad Company (or its lessees) fail or refuse to comply with any reasonable request of the Commissioner of Public Works to provide such seating accommodations, an ordinance could be passed by your Honorable Body to accomplish this object.

Respectfully submitted,

GEORGE E. DIERSSEN,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

OCTOBER 22, 1910.

In re PRICE OF GAS AFTER FEBRUARY 25, 1911.

HON. WILLIAM J. PRINGLE, Chairman, Committee on Gas, Oil & Electric Light.

Dear Sir:

We have your letter asking to be advised as to the price of gas after February 25, 1911, in the event that the City Council fails to fix a new rate before that day.

The Act of May 18, 1905, authorizes the City of Chicago to prescribe by ordinance maximum rates and charges for the supply of gas "for a period not exceeding five years," and the ordinance of February 14, 1906, by its terms becoming effective ten days after publication thereof, provides that no corporation supplying gas in the City of Chicago shall charge "for the next five years from and after the taking effect of this ordinance more than the sum of eighty-five cents for one thousand cubic feet of gas consumed or used." We are of the opinion that when the period fixed by the ordinance last mentioned expires there will be then no legal fixed rate to be charged for gas supplied to consumers within the city, unless a new ordinance is passed and made effective on or before that day.

Yours truly,

WILLIAM D. BARGE,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

OCTOBER 1, 1909.

In re DISCHARGE OF MEMBER OF POLICE DEPARTMENT APPOINTED UNDER CIVIL SERVICE FOR NEGLECT TO PAY JUST INDEBTEDNESS AND EFFECT OF INSTITUTION OF BANKRUPTCY PROCEEDINGS UPON SUCH DISCHARGE.

HON. H. F. SCHUETTLER, Assistant General Superintendent of Police.

Dear Sir:

Your communication addressed to Hon. Edward J. Brundage, Corporation Counsel, asking for an opinion of this department as to:

First. "Can a member of this department be discharged for violation of Rule 36, Section 34, of the Book of Rules and Regulations Governing the Police Department, which reads as follows: 'Neglect to pay a just indebtedness incurred while in the service, within a reasonable time'?"

Second. "Would the Police Department Trial Board be guilty of contempt of the Federal Court if it should discharge a member of this department for violation of Rule 36, Section 34, of the Book of Rules and Regulations Governing the Police Department, when such member has a petition in bankruptcy pending in the Federal Court?"

Also: "How would such action be construed by said court subsequent to a petition in bankruptcy and would such a member be entitled to reinstatement by reason of bankruptcy proceedings?"

has been referred to me for reply, and in complying with your request I will answer the questions in the order in which they are asked.

1. A police officer appointed under the provisions of the Civil Service Act of necessity becomes entitled to whatever protection such act affords him with reference to security in removal from office. Section 12 of the Civil Service Act (Hurd's Revised Statutes, 1908, page 412, Section 457) provides:

"No officer or employe in the classified civil service of any City who shall have been appointed under said rules and after said examination shall be removed or discharged, except for cause, upon written charges, and after an opportunity to be heard in his own defense."

It will be noted the statute does not specify what shall constitute "cause," and our Supreme Court in the case of *Kammann v. City of Chicago,* 222 Ill., page 630, held:

"Where the statute is silent as to what constitutes a ground for discharge by a civil service commission, the right to determine those questions is left to such commission,"

following its holding in *Joyce v. City of Chicago,* 216 Ill., 466.

Our courts, however, have further held that such cause for removal must be some substantial shortcoming on the part of the incumbent which renders his continuance in office or em-

ployment in some material way detrimental to the discipline or efficiency of the service, thereby strongly intimating, at least, that the discretion of the civil service commission in determining what shall constitute "cause" for removal is not unlimited or unrestricted but must be confined within the limits above indicated.

See:

Joyce v. City of Chicago, 120 Ill. App., 398. (Affirmed 216 Ill., 466.)

As to whether "neglect to pay a just indebtedness incurred while in the service within a reasonable time" would constitute sufficient cause for removal has been passed upon by our Appellate Court in the case of *City of Chicago v. Condell,* 124 Ill. App., page 64, wherein that court held:

"Neglect to pay within a reasonable time a just indebtedness does not exclude a perfectly honest inability to do so resulting from unforeseen accident. That to be a dishonest debtor, a confidence man, or, in common parlance, "a dead beat"—one, in the language of counsel for the City, 'who palpably fails to discharge a just debt after a reasonable opportunity and with ability to do so'—is a sufficient cause for separation from the city service, may be conceded without any effect upon the position taken here, that the cause set forth in the case at bar was no cause at all. If the civil service commission had power to remove petitioner for this reason they would have the equal power to do so because he voted the Republican or Democratic ticket or attended the Methodist or the Catholic church."

This decision of the Appellate Court in the Condell case was subsequently reversed by the Supreme Court in 224 Ill., page 595, but such reversal was based upon entirely different grounds, the Supreme Court holding that Condell had been guilty of laches in not seeking reinstatement within a reasonable time (he having delayed a year and a half in so doing), and denied him relief on that ground.

I deem it reasonably safe to assume that should this matter again come before the court it would probably follow the course indicated in the Appellate Court opinion and require that it be shown that neglect to pay an indebtedness would have to be what might be termed a wilful or dishonest neglect to do so,

and in the event such showing was made it would constitute sufficient cause for discharge.

2. The fact that a member has a petition in bankruptcy pending in the Federal Court would in nowise affect the right of the civil service commission to discharge such person, in the event that the ground for removal specified in the charges was a sufficient cause under the Civil Service Act.

The purpose of a bankruptcy proceeding is to deliver to the trustee in bankruptcy the property of the bankrupt not exempt by law, in existence and capable of transfer at the time of the filing of the petition in bankruptcy, for the purpose of permitting the trustee to divide the same amongst the creditors of the bankrupt. Any property acquired by the bankrupt subsequent to the filing of the petition in bankruptcy would not be included in such proceeding, and this would apply to salary subsequently earned by the bankrupt.

3. The subsequent discharge of the petitioner in a bankruptcy proceeding would in nowise affect his right to reinstatement in the city service, providing he was separated from the service in accordance with the provisions of the Civil Service Act.

Yours respectfully,
OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

OCTOBER 29, 1910.

In re RIGHT OF CITY TO REQUIRE RAILROAD COMPANY TO PAVE APPROACHES OF SUBWAY WITH MATERIAL OTHER THAN THAT SPECIFIED IN TRACK ELEVATION ORDINANCE.

R. M. COCHRANE, ESQ., Superintendent of Streets.

Dear Sir:

Replying, by direction of the Corporation Counsel, to your inquiry of October 26th, 1910, relative to the authority of the Commissioner of Public Works to require the Pittsburgh, Ft. Wayne & Chicago Railway Company to pave St. Lawrence Ave-

nue subway with material other than that specified in the track elevation ordinance, I beg to advise you that in view of what the Supreme Court of this State said in *City v. P. C. C. & St. L. Ry. Co.*, 244 Ill., 220, I am inclined to the opinion that said court would hold that the Commissioner of Public Works is without authority, and that even the City Council itself is without authority to require the Pittsburgh, Ft. Wayne & Chicago Railway Company to pave the subway in question with any material other than that specified in the track elevation ordinance by virtue of which it has elevated its tracks at the point in question.

Yours very truly,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

August 12, 1909.

POWER OF CITY TO ISSUE BONDS FOR ADDITIONAL LIBRARY BUILDINGS.

MR. HARRY A. WHEELER, 200 Monroe Street, City.

Dear Sir:

At the direction of the Corporation Counsel, I take great pleasure in answering four questions submitted by you:

(1) Can the City of Chicago, under the additional bonding power granted by the last General Assembly, issue bonds for the purpose of constructing branch public library buildings in different parts of the city?

The city has the undoubted right under the statute to borrow money on the credit of the corporation to be used for corporate purposes, and issue bonds therefor; provided, however, that such indebtedness does not exceed the limit set by law upon its taxation power. Under Chapter 81, Hurd's Revised Statutes, 1908, the city has the power to levy taxes for library purposes, and an appropriation might properly be made for the purpose of constructing branch public library buildings.

(2) Whether under existing authority the Library Board

has power to construct buildings and operate branch public libraries in different sections of the city.

The Chicago Public Library is a department of the municipality, The City of Chicago, exercising delegated powers, but the Library Board has no power to create any debt or to make any contract for the construction of a building except with the City Council's consent. The authority to levy taxes for library purposes is vested in the City Council and the appropriation of money for the construction of a building would, therefore, be fixed by an ordinance specifying in detail the amount of the appropriation therefor.

(3) Whether park boards have power to erect buildings adaptable to library purposes and to permit the Library Board to maintain a branch public library therein, and has the Library Board authority to operate such branch public library?

It appears to be well settled by the decisions of our Supreme Court that park boards are independent municipal corporations in themselves; that their jurisdiction within the purview of their powers is paramount and exclusive and that for most purposes they are no more to be considered a part of the city than if they were situated without the limits thereof. (*West Chicago Park Commissioners v. City of Chicago,* 152 Ill., 392.) Whether the erection of buildings for library purposes would be considered necessary and essential as a part of a well conducted park would, in my opinion, be a matter largely in the discretion of a park board. I am, however, of the opinion that the Library Board would have the legal right to maintain and operate a branch public library in any park within the confines of the city limits, providing the Park Commissioners consented thereto.

(4) Whether the Board of Education has power to erect suitable school buildings with a room or rooms therein for the Library Board to maintain a branch public library, and has the Library Board authority to operate the same?

By a late enactment of the General Assembly to establish and maintain a system of free schools, in force July 1, 1909, the Board of Education is given the power, with the concurrence of the City council, to erect or purchase buildings suitable for school houses and keep the same in repair and to buy or lease

sites for school houses with the necessary grounds and to issue bonds for the purpose of building, furnishing and repairing school houses or purchasing school sites and to provide for the payment of such bonds; and to borrow money for school purposes upon the credit of the city. No power is given the Board of Education of the city to erect buildings or to use the same for any other purposes than those above enumerated. The Board of Education, no doubt, has the right to maintain a library suitable for the use of the pupils of schools, but I am of the opinion that the Board of Education would have no right to give the Library Board authority to operate a branch public library in any room or rooms in such building for the benefit of the pupils or the public.

Yours very truly,
ROBERT R. JAMPOLIS,
Assistant Corporation Counsel.

Approved:
EDWARD J BRUNDAGE,
Corporation Counsel.

August 20, 1909.

MR. H. A. WHEELER, Chicago, Ill.

Dear Sir:

I am in receipt of your favor of August 19, and further answering the first of the questions heretofore asked by you, I beg to advise you that Section 13 of Chapter 81 of the Statutes of this State provides as follows:

"13. ERECTION OF BUILDINGS—PLAN—COST—BONDS—CERTIFICATE.] Sec. 13. Whenever any board of directors of any public library organized under the provisions of the act, of which this is an amendment, shall determine to erect a building to be used for their library, or to purchase a site for the same, or both, or to accumulate a fund for the erection of such buildings, or to pay for a library site, or both, they may do so as follows:

"The directors shall cause a plan for such building to be prepared and an estimate to be made of the cost, and if site is to be provided for the same, they shall also cause an estimate to be made of the cost of such site; they may then determine the time or years over which they will spread the collection of the cost of such building, or site, or both, not exceeding twenty

(20) years and shall make a record of their said proceedings and transmit a copy thereof to the city council for its approval. If the city council shall approve the action of the board it may, in its own discretion, by ordinance provide that bonds of the city be issued for the payment of the cost (so estimated as aforesaid) of the said building or site, or both, in which event the said ordinance shall also state the time or times when such bonds and the interest thereon shall become payable: Provided, that the whole of the principal of such bonds and the interest thereon shall be payable within twenty (20) years; provided, further, that the interest on such bonds shall not exceed the rate of five (5) per cent per annum; but the said interest may be made payable at such times (annually or semi-annually) as the said ordinance shall prescribe. Provided, always, that in case the city council shall provide for such payment by the issuance of bonds it shall make provision at or before the issuance thereof, by ordinance, which shall be irrepealable, for the levy and collection of a direct annual tax upon all the taxable property within such city sufficient to meet the principal and interest of said bonds as the same mature, which tax shall be in addition to that otherwise authorized to be levied and collected for corporate purposes. If, however, the said council shall not provide that bonds of the city be issued as and for the purposes aforesaid, but shall otherwise approve the action of the said board, then the board shall divide the total cost of said building, or site, or both, into as many parts as they shall determine to spread the collections thereof, and shall certify the amount of one of said parts to the city council each and every year during the time or terms over which they shall have determined to spread the collection of the cost of such building, or site, or both.

"The city council on receiving the said last mentioned certificate shall, in its next appropriation bill, include the amount so certified, and shall for the amount so certified levy and collect a tax to pay the same with the other general taxes of the city: Provided, the said levy shall not exceed five (5) mills on the dollar in any one year and shall not be levied oftener than for the number of years into which the Library Board in those cases where bonds are not issued, as aforesaid, shall have

divided the cost of said building, or site, or both; and when collected as last aforesaid the tax shall cease. (As amended by act approved and in force May 13, 1903. L. 1903, p. 226; *Legal News Ed.*, p. 187."

I am of the opinion that a portion of the additional bonds authorized by the last General Assembly, subject to approval by referendum vote next spring, may be voted by the City council on request of the Library Board for the construction of branch library buildings in different parts of the city, provided, that the Library Board take the necessary action which is specified by the Statute as a condition precedent to the Council action; and, provided, further, that the payment of these additional bonds so to be issued, added to the payment of any other charges or expenses on account of the Library Fund, would not necessitate a tax levy of to exceed one mill on the dollar annually, as Section 1 of Chapter 81 provides that in cities of over one hundred thousand inhabitants the tax levy for library purposes after the year 1896 shall not exceed one mill on the dollar annually.

Trusting this gives you the desired information, I remain,

Very sincerely yours,

EDWARD J. BRUNDAGE,

Corporation Counsel.

LIABILITY CITY OF CHICAGO FOR REMOVAL OF WIRES AND CABLES OF ACCOUNT OF TRACK ELEVATION.

March 8, 1910.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

Your communication to the Corporation Counsel under date of March 7, 1910, enclosing letter from the Chicago Telephone Company, has been referred to me.

The claim of the Telephone Company, amounting to $13,552.57, for bills filed against the city, represents expenses to which the Telephone Company has been put in changing its conduits, poles and wires in connection with track elevation. No particular instance is furnished in this communication, and I take it that the claims have resulted from the enforcement

of track elevation ordinances generally, which were enacted in pursuance of the inherent right of the municipality to the exercise of police power, and the work done by the railroad companies in obedience to these ordinances are considered public improvements.

The right in cities and boroughs to improve and change streets for public purposes is fundamental, and does not depend upon the use of any particular word or words in expressing it. Among the powers granted to the City of Chicago is the power to regulate and control the streets in the interest of the public health and safety. When these demand a change in the mode and manner of the enjoyment of an easement or special privilege and that demand is expressed through the municipal authority in the exercise of reasonable discretion, that change must be made. Calling the legislative grant of privilege to use the streets a contract does not avoid the conditions on which the privilege is to be exercised. Whether such limitation or condition be expressed in the grant or not is immaterial.

"The easement which a gas or water company has in the streets of a municipality is subject to the superior right of the public both in the surface and the soil beneath the surface."

"Where a city changes the grade of a street in order to do away with a railroad grade crossing, and a gas and water company is obliged to move its pipes from the street by reason of the change of grade, the company can recover no damages from the city for the injuries sustained."

Scranton Gas Co. v. Scranton City, 214 Pa. St., p. 586.

In the case of *Rafferty v. Central Traction Co.,* 147 Pa. St., 579, it is said:

"If for any reason such a change of grade by the municipal authorities, or to get below the frost line, the pipes and mains are required to be lowered, it certainly has never been supposed that the owners would have a right to recover damages against the municipality or other authority, on account of such lowering of pipes and mains."

It is unnecessary to cite other authorities to show that no liability results to the municipality, for the disturbance of a gas or water company's pipes in the public streets when made necessary by public consideration.

In the case of *National Water Works Co. v. City of Kansas,* 28 Federal Rep., p. 921, Mr. Justice Brewer, then judge of the Circuit Court, Western District of Missouri, says:

"A water company laying its pipes in the streets of a city, under a contract with the city, does so subject to the right of the city to construct sewers in said streets whenever and wherever the public interest demands, and if, in consequence of the exercise of this right, the company is compelled to relay its pipes, it can maintain no claim therefor against the city, unless the action of the city is unreasonable or malicious."

In the case of *Anderson v. Fuller,* 51 Fla., p. 380, the court uses the following language:

"While municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety and convenience notwithstanding the same may interfere with legal franchise rights. Thus a water company placing its pipes in the streets under a franchise contract with the city does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. And the city in such case has no authority voluntarily to burden itself or its taxpayers with the payment of damages necessarily consequent upon the reasonably careful and skillful execution of its authorized public works."

This doctrine is approved by our text-writers, notably McQuillin, Municipal Ordinances, p. 816, Section 521.

In the case of *Kirby et al. v. Citizens' Ry. Co.,* 48 Md. 168, the owner of a horse railway on Carey Street filed a bill to prevent the contractor from constructing a sewer under the bed

of the streets in pursuance of a contract made with the Mayor and City Council of the City of Baltimore. The question was whether the owner of the railway was entitled to an injunction to restrain the contractor and the city from removing the railway tracks or otherwise interfering with the use of said streets for railway purposes. The Court held that

"The power to construct sewers is expressly conferred on the city authorities by Section 835, of Article 4, of the Code of Public Local Laws.

"In the exercise of this power, they have the right not only to obstruct but to discontinue entirely the use of Carey Street as a highway, so long as it may be necessary for the purpose of constructing a sewer under the bed of the street.

"The easement acquired by the appellee under its charter and the ordinances of the Mayor and City Council is subject to this paramount right, and in constructing its railway the appellee knew or was bound to know that its use of the bed of the street for railway purposes was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare.

"They had no right, of course, to interfere capriciously or unnecessarily with the appellee's use of the street; but they were under no obligation to incur the expense either of shoring up the railway track or removing it to the one side of the street.

"The power then being lawful in itself, it could only become unlawful in consequence of the mode in which it was carried into execution. It is apparent from the bill that the sewer could not be constructed without interfering with the railway track of the appellee, and whatever injury may result thereform must be regarded in law as *'damnum absque injuria.'* "

"A municipal corporation when it confines itself within the limits of its power and jurisdiction is not liable to an action for consequential damages to private property where the act complained of was done by it or its officers under and pursuant to authority conferred by valid act of the legislature and there has been no want of reasonable care or want of reasonable skill

in the execution of the power, although the same act if done without legislative sanction would be actionable."

2 *Dillon, Mun. Corporations,* Sec. 987.

A telephone company placing its conduits, poles and wires in the streets under a franchise contract with the city does so in subordination to the superior rights of the public through its duly constituted municipal authorities to construct public improvements in the same streets whenever and wherever the public interest demands, and if in consequence of the exercise of this right the telephone company is compelled to relay its conduits and wires and reset its poles, in the absence of unreasonable or malicious conduct on the part of the municipality it has no cause of action against it for reimbursement on account thereof.

It must follow from the reasoning and authorities herein cited that the City of Chicago is in no way liable for the claims made against it by the Telephone Company for expenses incurred in changing its conduits, poles and wires in connection with track elevation.

Very respectfully,

FRANKLIN A. DENISON,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

June 30, 1910.

In re NUMBER OF TAGS FOR DEMONSTRATING CARS ALLOWED TO MANUFACTURERS OF AND DEALERS IN MOTOR VEHICLES.

HON. E. J. MAGERSTADT, City Collector.

Dear Sir:

In your communication of the 28th inst. you asked for an opinion as to whether, under Section 4 of an ordinance licensing motor vehicles, as amended on March 28, 1910, authorizing the City Collector to issue tags for demonstrating cars, not exceeding three in number, to dealers and manufacturers, a company or agency representing a number of manufacturers is entitled to but three demonstrating tags regardless of the num-

ber of manufacturers represented, or whether such company or agency is entitled to three tags for each and every manufacturer or dealer represented by it.

The ordinance regulating the licensing of vehicles passed February 3, 1908, makes it unlawful for any person, firm or corporation to use, or to cause or permit any of his or its agents or employes to use, any wagon or other vehicle in the transportation of persons or property upon the streets, avenues or alleys of the city, unless such wagon or vehicle be licensed. The second paragraph of Section 4 of said ordinance above referred to makes special provisions for demonstrating cars, and reads as follows:

"Provided, however, that if any manufacturer of or dealer in any of the motor vehicles mentioned in this ordinance shall make application to the City Collector and shall state therein, under oath, that he is such a manufacturer or dealer within the city, and that he desires a license plate to be used by him in testing or demonstrating such motor vehicles upon the streets of the city, and that he will use such license plate only for such purpose, the City Clerk shall, upon the payment by such applicant of one dollar to the City Collector, issue to such manufacturer or dealer a distinctive license plate with a number thereon, which may be attached to or borne by any such motor vehicle while being operated upon the streets of the city for the purpose of testing or demonstrating such vehicle, and when any such vehicle is in use for such purpose and carries such license plate, no other license fee shall be collected under this ordinance and no other license plate need be affixed to such vehicle; but not to exceed three such license plates shall be issued to any such manufacturer or dealer."

Said provision above quoted expressly provides that "not to exceed three such license plates shall be issued to any such manufacturer or dealer."

I am, therefore, of the opinion that a manufacturer or dealer is only entitled to three license plates for demonstrating cars, regardless of the number of models or the number of different makes of machines that may be kept or used in the establishment of such manufacturer or dealer. In other words,

not more than three license plates for demonstrating cars should issue to any one person, firm or corporation.

Respectfully yours,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

May 24, 1910.

In re NAVIGABILITY OF, RIPARIAN RIGHTS ON, AND POLLUTION OF WATERS OF, LAKE CALUMET.

HON. CHARLES E. READING, Alderman, Thirty-third Ward.

Dear Sir:

Your several inquiries regarding Lake Calumet have been duly considered, together with letter submitted from the U. S. General Land Office, under date of May 7, 1910, and in reference thereto I beg to advise you as follows:

First: AS TO NAVIGABILITY OF LAKE CALUMET.

Whether a lake is navigable is generally a question of fact.

People v. Board of Supervisors, 122 Ill. App., 40.

And depends upon whether used, or susceptible of being used, in its ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Schulte v. Warren, 218 Ill., 108.

From inquiries made on this point I should say that Lake Calumet is a navigable body of water, although the question has never been determined by the courts.

Second: AS TO THE RIGHT OF SHORE OWNERS TO FILL IN LAKE CALUMET.

Lake Calumet was surveyed by the United States Government as a meandered lake, that is, the lines of the shore lands run to the water's edge.

The waters on meandered lakes, and the land covered by them, are held by the State in trust for all the people, and a grant of the shore land therefore conveys to the water's edge with riparian rights, that is, the right of natural accretions and natural relictions. Reliction is the gradual recession of

the waters of a meandered lake and gives the shore owners the right to the new land by following the recession of waters to their edge.

Fuller v. Shedd, 161 Ill., 462.

But no shore owner can take away from the State its title to the former bed of the lake, unless he can establish by proof that the dry land was formed by the receding of the water from his own shore line.

Hammond v. Shepard, 186 Ill., 235.

It appears that the drainage of the whole Calumet district and the dredging and opening to navigation of the Calumet River have tended to lower the level of Lake Calumet so that by the reliction of the waters the submerged lands adjoining the shore have for a considerable distance become dry land. Land made in this way is the property of the adjoining shore owner. But, lands made or recovered in any other way than by natural accretion or natural reliction are made illegally and are a trespass upon the rights of the State and may be recovered by a proceeding in the name of the State by the Attorney General or State's Attorney.

Third: AS TO POLLUTION OF THE WATERS OF LAKE CALUMET.

Sections 1002 to 1006 of the 1905 Municipal Code of Chicago prohibit the pollution of the waters of the harbor of Chicago, but the definition given in Section 969 of the harbor of Chicago does not include Lake Calumet, and the sections referred to are, therefore, not applicable. The pollution of the waters of Lake Calumet, however, would constitute a nuisance under Sections 1201 to 1209 of the Revised Municipal Code, and the enforcement of these sections is the duty of the Commissioner of Health. An action for such pollution could also be brought under the State law on nuisances, paragraph 221 of the Criminal Code, and would be in charge of the State's Attorney.

CONCLUSION.

If any considerable filling has been done in Lake Calumet, it would be advisable to have a survey of the shore line made

and an investigation started to show by whose acts and under what circumstances additional lands have been made.

Yours truly,

ADOLF TRAUB,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

JURISDICTION OF CITY TO PASS REASONABLE REGULATIONS.

CHICAGO RIVER.

April 27, 1910.

CHARLES M. FOELL, ESQ., Alderman, Twenty-first Ward.

Dear Sir:

In response to your verbal request for an opinion concerning the validity of the recent ordinance passed by the City Council relative to the use of tugs by vessels of over twelve hundred tons in navigating the Chicago River, I beg to advise you that the river is regarded as a public highway, much the same as if it were a street, and while the jurisdiction of the Federal Government over the river is paramount to the jurisdiction of the city in the premises, the city has ample authority to make reasonable regulations concerning the navigation of the river, provided such regulations do not conflict with the regulations made by the Federal Government. (*Harmon v. City,* 110 Ill., 400.) While, of course, all authority is primarily vested in the State, the State may delegate such authority to the municipality as it may see fit; and so far as the question here involved is concerned, the State has conferred upon the city plenary power. (*Harmon v. City,* 110 Ill., 400.)

The particular provisions of the Cities and Villages Act giving authority in the premises to the city are clauses 35 and 37 of Section 63, Chapter 24, S. & C., which give the city authority—

"To make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges,"

and

"To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor or within such jurisdiction."

Therefore, unless the ordinance under consideration can be said to be unreasonable in its provisions, it is valid. Such ordinances have been passed in other jurisdictions and enforced, and I can see no reason why the particular ordinance referred to by you should be held invalid.

Respectfully submitted,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

July 7, 1910.

In re USING WATER FROM CHICAGO RIVER.

HON. WALTER H. WILSON, City Comptroller.

Dear Sir:

Replying to yours of July 6th, wherein you ask in relation to the manufacturing and mercantile plants whose property abuts on the river using water from the river, permit me to say:

It seems to be the well settled law in this State that an owner of property abutting upon any navigable body of water has a right to the reasonable use of the water in the river upon which his lands abut for his own benefit and use for manufacturing and other purposes.

Washington Ice Co. v. Shortall, 101 Ill., 46.

Canal Trustees v. Havens, 11 Ill., 554.

It seems to be the well settled law in this State that whenever any water from any source is turned into a flowing stream, it becomes a part of the natural stream and whoever causes the water to turn into the natural stream has no right or control over it.

Druly v. Adam, 102 Ill., 177.

Adams v. Slater, 8 Ill. App., 72.

I am, therefore, of the opinion that the city cannot restrict or prevent the use of water from the Chicago River or any of its branches or slips by persons who own land abutting on said river, branches or slips, the only exception to this being

where the water is used for any purpose detrimental to the public health or welfare.

Respectfully submitted,

FRANK L. CHILDS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

November 4, 1910.

In re POWER OF CITY TO SELL BONDS BELOW PAR.

EDWARD J. BRUNDAGE, ESQ., Corporation Counsel.

Dear Sir:

In accordance with your request I have made an investigation concerning the power of the city to sell bonds below par, and beg to submit the following:

(1) It is assumed that the power of the city "to borrow money on the credit of the corporation for corporate purposes, and to issue bonds therefor, in such manner and form, and on such conditions as it shall prescribe" (Chapter 24, Article 5, Section 1) is sufficient to authorize the city to sell its bonds as negotiable securities.

(2) So far as I have been able to find, there is no provision in the Illinois statutes that municipal bonds must be sold at par.

(3) I have been able to find no provision in the Illinois statutes fixing the rate of interest for municipal bonds.

(4) The maximum legal rate of interest which bonds or other negotiable securities may bear in Illinois is 7 per cent.

(5) Unless there is an express statutory prohibition against such action, a municipality may sell its bonds for less than their par value.

28 *Cyc.* 1597.

Lynchburg v. Slaughter, 75 Va., 57.

Austin v. Nalle, 85 Tex., 520.

22 *Southwestern Rep.,* 668.

In *Lynchburg v. Slaughter, supra,* it was urged that the bonds were sold for less than their face value and were therefore void. The Court said (p. 59):

"This argument might have been addressed to the legislature which granted the charter to the city of Lynchburg with more propriety than to this court. By that charter authority to contract loans and issue certificates of debts or bonds is conferred in the broadest language. No limitation is imposed with respect to the terms on which such loans may be negotiated. In the absence of some such limitation, the power to borrow money carries with it as an incident the power to agree upon the terms of the borrowing. According to a well-known usage and custom, municipal corporations almost universally contract loans by a sale of their bonds made with reference to prices current, and not to their par value.

"If the argument now advanced should prevail with the courts, it would invalidate three-fourths of the municipal bonds of the country in the hands of the original purchasers. For, in but few instances, until very recently, were these securities sold at their face value. And this fact must have been well understood by the legislature when it conferred upon the various municipalities of the State the power to contract loans and issue bonds and certificates of indebtedness for municipal purposes."

In *Austin v. Nalle, supra,* it was urged that the city had not been authorized to sell negotiable bonds and also that the bonds could not be sold below their face value. There was nothing in the statute or ordinance which provided that the bonds should be sold at par. The Court said:

"As averred in the petition, by virtue of an ordinance of the City Council the question of issuing bonds to the amount of $1,400,000 was submitted to the taxpayers of the city at an election, and the proposition was carried by the requisite two-thirds vote. It is alleged, however, that between the date of the ordinance ordering the election and the election itself, the City Council passed another ordinance, creating a board of public works, in which it was provided that the bonds which were proposed to be issued should not be sold at less than par. It is also averred, in effect, that after the election this provision was repealed, and that the bonds were placed upon the market at 95 cents on the dollar, and that such of the bonds as were actually sold, if any, were sold at that price. It is also alleged, in substance, that the vote in favor of the bonds was

induced mainly by representations made to the voters that none of the bonds should be sold below par. It is now insisted that by reason of these facts it was illegal to repeal the provision, and to sell the bonds at less than their face value. The proposition submitted at the election contained no condition limiting the price at which the bonds should be disposed of; and the citizens who voted at the election must be held to have known that the ordinance which had been passed, limiting the price, was subject to repeal by the Council which passed it, or by any future Council. Conceding for the sake of the argument that we could inquire into an election held strictly according to the terms of the law, we are of opinion that we could not set it aside by reason of any fraudulent representations that may have been made to the electors in order to procure their votes. Having a plain proposition submitted to them, the voters must be presumed to know its meaning and effect, and to act at their peril; and in the absence of bribery, or other like corrupt influence, in a proceeding affecting the validity of the election, no inquiry as to their motives can be permitted. The proposition submitted at the election did not limit the rate of interest the bonds were to bear. The question of discount, in such a case, in its final analysis, is a mere matter of interest, and ought in no respect to affect the validity of the bonds, provided the discount and the interest expressed do not make the rate usurious. In this case the bonds bore interest at the low rate of only 5 per cent per annum, and the discount was only 5 per cent of their face value. Therefore the bonds are not invalid on that account."

Where the municipality is authorized to sell its bonds at public sale they may be sold below par.

21 Am. & Eng. Ency. of Law, 59, citing:

Memphis v. Bethel (Tenn), 17 Southwestern Rep., 91.

Austin v. Nalle, 85 Tex., 520.

Yesler v. City of Seattle, 1 Wash., 308.

In the latter case it was held that the bonds were legally sold at a discount, even though the ordinance authorizing their issue, which was submitted to the people, provided for a sale at par.

Where the rate of interest is not limited by the statute

bonds are not invalid because sold below par, if the discount added to the interest expressed does not make the rate usurious.

Austin v. Nalle, 85 Tex., 520.

28 *Cyc.* 1597.

Sherlock v. Village of Winnetka, 68 Ill., 530.

In the latter case, the Board of Education was authorized to borrow money at not to exceed 10 per cent per annum. The board sold bonds bearing 10 per cent interest on their face at 95 per cent of their face value and with ten months' accrued interest. The Court at page 538 said:

"It is urged that the Board of Education had no power to discount these bonds when they were sold; that the rate of interest is limited by their charter to 10 per cent, whilst, when sold for $50 less than the face of each bond, and with, perhaps, seven to ten months' accrued interest, as they were dated that length of time before they were sold, the rate of interest actually paid was much more than 10 per cent per annum. Whilst we regard this action by the Board of Education as unauthorized and an abuse of power, and for which they are, probably, individually liable to the extent of the loss thus incurred, that act would not render the bonds void. Whilst it may, no doubt, be relied upon in the hands of the original holder as usury, it by no means follows that it renders the bonds invalid."

This case, in my opinion, does not hold that the municipality has no power to sell bonds below par, but only that the Board of Education had no right to make a usurious contract and that the members of the board were probably individually liable for the damage resulting to the city by reason of the fact that the interest on the amount of money actually received was greater than the legal rate.

In a large number of States, statutes have been enacted which expressly provide that municipal bonds shall not be sold below par. This would seem to show plainly that in the absence of such a statute the sale of municipal bonds below par is legal. In my opinion, the great weight of authority is that in the absence of a statute expressly providing that muncipal bonds may not be sold at less than par, the proper municipal authorities have the power to make the sale at the highest market price which can be obtained, whether that price be above

or below par. I am all the more of this opinion because in almost every case it would be easy for the City Council to provide that the bonds shall bear a rate of interest which would make them sell well above par. In other words, the question of the sale price of bonds is almost, if not entirely, a matter of interest. Very respectfully yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

November 15, 1910.

In re WHETHER CITY OF CHICAGO CAN LEGALLY PAY PREMIUM CHARGED BY SURETY COMPANY ON OFFICIAL BONDS OF BAILIFF AND DEPUTY BAILIFFS OF MUNICIPAL COURT OF CHICAGO.

HON. THOMAS M. HUNTER, Bailiff, Municipal Court of Chicago.

Dear Sir:

Your communication of the 5th inst. addressed to Hon. Edward J. Brundage, Corporation Counsel, wherein you ask for an opinion as to whether the City of Chicago can legally pay the premium fee charged by surety companies for acting as surety on official bonds furnished by yourself and your deputy bailiffs, has been referred to the writer for reply.

I note that you state your bond is for the sum of $100,000 and that your deputy bailiffs each furnish bond in the sum of $20,000; that you are commissioned by the Governor, sworn in by the County Clerk, that your bond was originally approved by the Circuit Court judges and runs to the People of the State of Illinois, and that all of your deputy bailiffs' bonds run to you.

As to whether or not the City of Chicago would be empowered to make an appropriation for this purpose in the absence of express legislative authority we are not concerned, inasmuch as our State Legislature in 1897 passed an act entitled "An Act to authorize the payment of the cost of corporate suretyship upon official bonds," which appears as Paragraph 19 of Chapter 103, Hurd's Revised Statutes of 1908, under the head "Official Bonds," which reads as follows:

"That the State or any county ,township and municipality, public board or body may pay out of the funds of said State,

county, municipality, township or board the cost of any official bond furnished by any officer of said State, county, township, municipality, public board or body required by the laws, rules or regulations thereof to execute the same, in case said officer shall furnish the same with a surety company or companies authorized to do business in this State under the laws thereof, said cost not to exceed, however, one-half of one per cent per annum on the amount of said bond or obligation by said surety executed."

This statute clearly enables any of the bodies therein named, at their discretion, to make provision for the payment of premium fees charged by surety companies for acting as surety on official bonds, the only limitation thereon being that such bonds must be official bonds required to be executed by the laws, rules or regulations of the bodies therein named; that the surety company or companies executing same must be authorized to do business in this State under the laws thereof, and that the cost or premium fee shall not exceed one-half of one per cent per annum on the amount of the bond or obligation executed by such surety company.

It being clear, then, that any of the bodies named in the Act may, in their discretion, make provision for the payment of the premium fee of surety companies on official bonds, the question to be determined is whether a particular officer is a State, county, township, municipal, public board or body officer under the provisions of the Act above quoted.

The office of bailiff of the Municipal Court is created under Paragraph 279 of the Municipal Court Act. The manner of his election, his qualifications, his powers, duties and liabilities, terms of bond, issuance of his commission and oath of office are therein prescribed. In Paragraph 280 of said Act, like provisions are made with respect to his deputies.

The bailiff and deputies are an integral part of the court created by said Act, and therefore would come under the same classification with respect to being State, county or municipal officers, as the court itself.

Our Supreme Court in *Miller v. The People of the State of Illinois,* 230 Ill., page 65, has held that "the Municipal Court of Chicago is a local court of the city, established for the

purpose of administering the law within the city, and is not a part of the judicial department of the State at large"; and in the same case the court also held "that the Municipal Court of Chicago is a proper part of the city government for the enforcement of city ordinances, and as a part of such government it may be given jurisdiction for the purpose of enforcing all laws within the city." In the Miller case, the court reaffirms its decision in *City of Chicago v. Reeves,* 220 Ill., 274, wherein the constitutionality of the Act creating the Municipal Court in Chicago was upheld. See also *Hosking v. Southern Pacific Company,* 243 Ill., page 320.

In the case of *McGann v. People ex rel, Simpson,* 227 Ill., 567, our Supreme Court affirmed a judgment of the Circuit Court of Cook County awarding a writ of mandamus directed to Lawrence E. McGann, Comptroller of the City of Chicago, and the City of Chicago, commanding the said Comptroller to deliver to the relator a warrant drawn upon the City Treasurer of the City of Chicago for the salary of relator as Deputy Clerk of the Municipal Court of Chicago.

The contention of the City of Chicago in the McGann-Simpson case was that the office of deputy clerks of the Municipal Court of Chicago came under the provisions of the Civil Service Act of 1895, which had been adopted by a vote of the people of the City of Chicago, and that inasmuch as Simpson had not been appointed to his office under the provisions of the Civil Service Act he was not entitled to be paid out of the municipal treasury for his services. The Supreme Court held that the Legislature had not required the appointment of deputy clerks of the Municipal Court of Chicago to be made under the provisions of the Civil Service Act, inasmuch as Section 15 of the Municipal Court Act provided for the manner of appointment of deputy clerks of the Municipal Court, and held that if such manner of appointment differed from that provided for by the Civil Service Act and by reason thereof there arose a conflict between the provisions of the two acts, the Municipal Court Act being the latest enactment by the Legislature must necessarily control, and appointments would have to be made thereunder.

This ruling was subsequently adopted and applied to dep-

uty bailiffs of the Municipal Court of Chicago in the case of *McGann v. People ex rel. Henson,* 228 Ill., page 203.

By the above decisions, I am of opinion the status of bailiffs of the Municipal Court as officers of the municipality of the City of Chicago was clearly established, and this notwithstanding the fact it was held they did not come under the provisions of the Civil Service Act with reference to their appointment to office.

The suggestion contained in your letter, that inasmuch as you are commissioned by the Governor, sworn in by the County Clerk and your bond originally approved by the Circuit Court Judges might alter your status as a municipal or State officer, I do not think of great weight, inasmuch as the Municipal Court Act provides that the bailiff shall furnish a bond similar to that furnished by the Sheriff until such time as other provisions are made therefor. I do not believe it could be successfully contended that the mere fact that the Sheriff of Cook County furnishes a bond running to the People of the State of Illinois and that his deputy sheriffs, provided by law, furnish bonds running to him, would in either instance change the status of such Sheriff or deputy sheriff from that of county officers to State officers. I believe the true criterion by which to determine whether a given office be a State, county or municipal office is the scope of the duties of that particular office, and applying this rule to your office and taking into consideration the decisions of our court relative to the status of the Municipal Court, it seems to me clear that the bailiff of the Municipal Court of Chicago and the deputy bailiffs provided for under the Act establishing said court and said officers are municipal officers.

With reference to the fact that you are commissioned by the Governor, I do not consider that of consequence, inasmuch as it is not the action of the Governor in issuing your commission which primarily establishes your right to the office, but it is first necessary that you be elected by the people in the manner prescribed by law, and I consider that your commission by the Governor is but evidence of your title to the office and has no great bearing upon the character or status of the office itself.

From the above and foregoing it appears to me clear that

the City of Chicago may, if it see fit, make provision for the payment of premium fees charged by surety companies on official bonds furnished by yourself and your deputy bailiffs, and inasmuch as such election on the part of the City of Chicago involves a discretion, I am of opinion that such discretion would have to be exercised by the City Council of the City of Chicago by the passage of the proper ordinance.

Yours respectfully,

OSCAR H. OLSEN,

Approved: *Assistant Corporation Counsel.*

EDWARD J. BRUNDAGE,

Corporation Counsel.

December 16, 1910.

In re CHARTER POWERS TO LIMIT HEIGHT OF BUILDINGS.

HON. THEODORE K. LONG, Chairman, Committee on Buildings.

Dear Sir:

Answering your request for an opinion as to whether the City Council has the charter power to limit the height of buildings, I beg leave to state that our specific charter powers relative to the construction of buildings are contained in Clause 61, Chapter 24, Hurd's Revised Statutes, by which our City Council is given the right "to prescribe the thickness, strength and manner of constructing stone, brick and other buildings, and the construction of fire escapes therein."

The words "manner of constructing stone, brick and other buildings" require careful consideration. The noun "manner" has been defined by Webster as: "The mode in which anything is done; the way of performing or effecting anything; mode of action; method; style; form; fashion." It has been judicially defined in relation to construction work in the case of *City of Erie v. Caulkins,* 85 Pa. St. Opinion, page 252, where there was a provision in a contract which provided that:

"All work to be commenced and carried on at such times, and in such places, and in such manner as the engineer shall direct, in which case the Court said: 'Manner must, in such case, mean the power to control the work, not only as to its character but also as to the particular means to accomplish it.'

. . . It is quite obvious that the word 'Manner' must be construed with reference to the contract in which it is found. The word 'manner' in a statute giving the power to make an allowance in the manner as now prescribed by the court of civil procedure in civil actions means the way of managing."

Where an enumeration of specific things is followed by some more general words or phrases, such words or phrases are to be held to refer to things of the same kind.

Spaulding v. People, 172 Ill. Opinion, p. 49.

The specific power to prescribe the thickness and strength and manner of constructing buildings necessarily implies the right to regulate height and thickness depending upon the same.

Independent of the specific charter powers contained in Clause 61, *supra,* relative to buildings, the grant of general police powers to the city are, in my opinion, broad enough to give the City Council power to pass an ordinance limiting the height of buildings within such limitations as I shall hereafter mention.

Among the general police powers vested in the City Council are these:

To pass and enforce all necessary police ordinances.

To do all acts and make all regulations which may be necessary for the promotion of health or suppression of disease.

An opinion was given by this office in 1891 by John S. Miller, then Corporation Counsel, to the effect that the City Council has the power to limit the height of buildings within certain limitations and specifies these limitations. I quote from his opinion as follows:

"The City Council may take into consideration all of the circumstances bearing upon the question of the public good. The public upon the streets are entitled to light and pure air, and to travel the streets with safety. It is a matter of public concern that buildings should be safe to the occupants. If the health of the occupants of the buildings or public is affected by the question in hand of the height of the buildings, that may be considered. The question of congestion of travel upon the streets produced upon the prevalence of high buildings may be considered. The width of the streets may be considered. . . . In fact, every circumstance and consideration in

connection with the matter affecting the common good may be taken into consideration." . . .

A state law which divided the city of Boston into zones and contained a limitation of the height of buildings in the business district, with a lower limit of height for the residence district, was enacted by the Legislature of Massachusetts and sustained by her Supreme Court in the case of *Welsh v. Swasey,* 193 Mass., 336, which decision was affirmed by our United States Supreme Court, 214 U. S., 91, in which case the court held that "in the exercise of the police power, the Legislature may *regulate* and *limit* personal rights and the rights of property in the interests of public health, public morals and public safety"; and that "the erection of various high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air, and thus affect public health. It may all increase the danger to persons and property from fire and be the subjects of legislation on that ground"; and that the regulation of height and mode of construction of buildings are the proper exercise of the police power, but such regulation should be reasonable not only in reference to the interests of the public but also in reference to the rights of the land owners, and should be reasonably necessary to accomplish the purposes for which it was adopted.

My attention has been called to the case of *People ex rel. Goldberg v. Busse,* 240 Ill., 38. I have carefully examined that case and am of the opinion that it does not conflict with the conclusions reached herein.

I am, therefore, of the opinion that the City Council has the charter power to pass an ordinance limiting the height of buildings, but that such ordinance must be reasonable in its terms. Respectfully submitted,

(Signed) WM. S. STAHL,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE, (Signed)
Corporation Counsel.

In re VALIDITY OF ORDER REQUIRING PRINTING TO SHOW UNION LABEL.

January 21, 1911.

HON MICHAEL MCINERNEY, Chairman, Committee on Police Department and Bridewell.

Dear Sir:

There has been referred to me for redrafting an order which reads as follows:

"ORDERED, That the Business Agent of the City of Chicago and the various departments of the city be and they are hereby requested to have the label of the Allied Printing Trades Council appear on all printed matter used in the city service in so far as the same is practical and consistent."

In looking over this order and in investigating the law with reference to its legality, I find that an ordinance passed by the City of Alton requiring all contracts for city printing to be awarded to Union shops only or to such printing houses only as are able to show the union label, is illegal as tending to create monopoly and impose additional burdens upon taxpayers who are entitled, under Paragraph 94 of Section 1 of Article V of the City and Village Act, to have such contracts let to the lowest responsible bidder. (See *Holden v. City of Alton,* 179 Ill., 318.)

This decision is in harmony with other decisions of the court, viz.: *Adams v. Brenan,* 177 Ill., 194, and the later case of *Fisk v. The People,* 188 Ill., 206.

In view of this fact, I desire to be advised as to your wishes in the matter as to the preparation of this order.

Yours very truly,

HOWARD W. HAYES,
Assistant Corporation Counsel.

In re LIABILITY OF RAILROAD COMPANY TO PAY LAND DAMAGES OCCASIONED BY THE ELEVATION OF ITS TRACKS.

June 7, 1910.

WALTER J. RAYMER, ESQ., Commissioner, Track Elevation.

Dear Sir:

Replying to your request of June 6, for an opinion concerning the liability of a railroad company for land damages

occasioned by the elevation of its railroad tracks, I beg to advise you that while the precise question has not been adjudicated on in this State, another question quite identical in principle has been passed upon. That is to say, it has been held by the Supreme Court of this State that by virtue of a provision which is contained in most of the right-of-way ordinances under which companies in this city operate, such companies were liable for the land damages occasioned by the construction of viaducts leading over their tracks. In most of the right-of-way ordinances under which the various railroads in the city operate is found a provision substantially as follows:

"The provision and authority hereby granted are upon the further express condition that said railroad company shall and will forever indemnify and save harmless the City of Chicago against and from any and all legal damages, judgments, decrees and expenses of the same which it may suffer or which may be recovered or obtained against said city for or by reason of the granting of such privileges and authority or for or by reason of or growing out of or resulting from the passage of this ordinance or any matter or thing connected therewith or with the exercise by said company of the privileges hereby granted, or from any act or acts of said company under or by virtue of the provisions of this ordinance."

It is quite likely that no one will question the proposition that there is no difference in principle between the construction of viaducts leading over tracks and track elevation, but that track elevation is simply the modernized method of segregating the grade of the street from the grade of the railroad, a function which is accomplished in a less satisfactory manner by the construction of a viaduct leading over the railroad tracks.

If, therefore, as has been held in *C., B. & Q. R. R. Co. v. City,* 134 Ill., 323, and *C., M. & St. P. Ry. Co. v. City,* 183 Ill., 341, the railroad company is liable for land damages resulting from the construction of viaducts, it would seem to follow as a necessary conclusion that the railroad company is also liable for land damages occasioned by track elevation.

But, independently of the liability for land damages based on the provisions of the ordinance, it was held by the Supreme Court of the United States in *N. Y. & N. E. R. R. Co. v. Bristol,*

151 U. S., 556, that a grade crossing was a nuisance which it was competent for the Legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part or all of the expense of such abatement.

Inasmuch, therefore, as the land damages are a part and parcel of the expense of the abatement of the grade crossing nuisance, it would seem to follow that the railroad company might be liable independently of the terms of its right-of-way ordinance to pay the land damages occasioned by track elevation.

I am, therefore, of the opinion that a railroad company is liable to pay the land damages occasioned by the elevation of its tracks. Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re EXHIBITION OF JEFFRIES-JOHNSON PRIZE FIGHT MOVING PICTURES.

JULY 27, 1910.

COL. LEROY T. STEWARD, General Superintendent of Police, Chicago.

Dear Sir:

In regard to the power of the Chief of Police to prohibit the exhibition of the Jeffries-Johnson prize fight moving pictures in the City of Chicago, permit me to say:

The principal provisions of the ordinance of November 4, 1907, entitled "An ordinance prohibiting the exhibition of obscene and immoral pictures and regulating the exhibition of pictures of the classes and kinds commonly shown in mutoscopes, kinetoscopes, cinemetographs and penny arcades," are essentially as follows:

The ordinance requires those engaged in the business of exhibiting moving pictures to secure a permit for the exhibition of such pictures, and provides that the chief of police shall not issue a permit for the exhibition of any obscene or immoral

picture or series of pictures, but that he shall issue a permit, without fee or charge, for all pictures which are not obscene or immoral.

The ordinance declares that it shall be unlawful for any person, firm or corporation to show or exhibit in a public place, or in a place where the public is admitted, any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, cinemetographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades and in all other automatic or moving picture devices, without first having secured a permit therefor from the chief of police. It requires the applicant for a permit to show to the chief of police the plates, films, rolls and other like apparatus by or from which the picture or series of pictures is shown or produced or the picture or series of pictures as shown or exhibited. The chief of police must either grant or deny the permit within three days after such inspection, and if the picture or series of pictures is immoral or obscene, he must refuse the permit, but otherwise it is his duty to grant it. If the chief of police refuses to grant a permit the applicant may appeal to the mayor, whose decision shall be final.

This ordinance was fully upheld and sustained in a very able opinion delivered by Mr. Chief Justice Cartwright, of the Supreme Court of Illinois, in *Block vs. City of Chicago,* 239 Ill., 251, in which the court held that, "An ordinance prohibiting the exhibition of moving pictures which are obscene and immoral is not invalid because it leaves to the chief of police, in the first instance, the determination of the question whether such pictures are obscene and immoral." . . .

The court said further:

"Manifestly it would be impossible to specify in any ordinance every picture or particular variety of picture which would be considered immoral or obscene, and no definition could be formulated which would afford a better standard than the words of the ordinance. It is doubtless true, as said by counsel, that there are people who differ upon the subject as to what is immoral or obscene. There are the shameless and unclean, to whom nothing is defilement and from whose point of view no

picture would be considered immoral or obscene. Perhaps others could be found, with no laxity of morals, who pay homage to art and would not regard anything as indelicate or indecent which had artistic merit, and would look upon any person entertaining different sentiments as of inferior intelligence, without proper training on the subject and blinded by bigotry. Both classes are exceptional, and the average person of healthy and wholesome mind knows well enough what the words 'immoral' and 'obscene' mean and can intelligently apply the test to any picture presented to him." . . . "It is presumed that the chief of police, or the mayor, in case of an appeal to him, will perform his duty with reasonable intelligence and in accordance with the generally accepted meaning of the words." . . .

"There is a general averment in the bill that the complainants are engaged in exhibiting moving pictures which are not immoral or obscene, but there is no averment that the pictures specifically mentioned, which are the 'James Boys' and the 'Night Riders,' or the others for which permits were refused, were not immoral or obscene. It is true that pictures representing the career of the 'James Boys' illustrate experiences connected with the history of the country, but it does not follow that they were not immoral. Pictures which attempt to exhibit that career necessarily portray exhibitions of crime, and pictures of the 'Night Riders' can represent nothing but malicious mischief, arson and murder. They are both immoral and their exhibition would necessarily be attended with evil effects upon youthful spectators. If the other pictures for which permits were refused were of similar character the chief of police is to be commended for the refusal."

Engaging in a prize fight is made a crime by the Criminal Code of Illinois (Section 232, Chapter 38, Hurd's Revised Statutes of 1908), and the exhibition of the pictures of a prize fight necessarily portrays a crime.

Under the reasoning of the court in the Block case, there can be little doubt but that any court would hold that the pictures of a prize fight are immoral.

I am of the opinion, therefore, that the chief of police and the mayor may legally prohibit and prevent the exhibition of

moving pictures of the Jeffries-Johnson prize fight within the city of Chicago.

Yours very truly,
EDWARD F. BRUNDAGE,
Corporation Counsel.

In re HIGH PRESSURE SYSTEM.

JANUARY 6, 1911.

HON. B. J. MULLANEY, Commissioner of Public Works.

Dear Sir:

We have your letter asking to be advised upon matters connected with the proposed high pressure system, and we submit the following as our opinion:

Your first question is "Has the City authority to install a high pressure water system, together with the necessary connections and pumps for its operation, in any given district, and to levy and collect special assessments to pay for the same?"

The City has authority to install a high pressure water system, with all the necessary connections and pumps, at any place it may designate, and levy and collect special assessments to pay for the same, if that system is used solely for the purpose of extinguishing fires in the area assessed, and that no connections with the system be permitted for any other purpose.

"Would the City have authority to install a high pressure water system, together with all connections, pumps, etc., necessary for its operation, in a particular and restricted district and to pay for same out of the general water fund?"

As one of the objects sought in the installation and maintenance of a water system is the protection of property against loss or damage by fire, the city has ample authority to make special provision for that purpose and to install high pressure systems wherever, in the judgment of the city, such a system is needed, and the expense of such work can be paid out of the general water fund.

Your last question is, "Has the City authority to establish a high pressure water system and to pay for it either by special assessment or out of the water fund in a district where streets are not open to general traffic?"

The City may establish a high pressure water system wher-

ever it may choose, and may pay for it either by special assessments or out of the water fund, and it is not material to know that there are or are not streets open to general traffic. The purpose is to afford additional protection against loss by fire, but the existence or non-existence of streets open to general traffic may have some bearing upon the particular property, otherwise it is not important.

Very truly yours,
WILLIAM D. BARGE,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

In re RIGHT OF RAILROAD COMPANY TO LAY ADDITIONAL TRACKS AFTER HAVING ONCE EXERCISED ITS ELECTION AS TO A NUMBER OF TRACKS.

DECEMBER 29, 1910.

H. V. MCGURREN, ESQ., Superintendent, Bureau of Compensation.

Dear Sir:

Replying to your request for an opinion as to the right of the Atchison, Topeka & Santa Fe Ry. Company to lay an additional track, I beg to advise you that where a grant is made to a railroad corporation whereby there is conferred upon it the right of election as to whether it will construct not to exceed four tracks and it exercises the right of election so conferred by constructing less than four tracks, it thereby exhausts its authority in the premises and may not thereafter, in the absence of a grant authorizing it so to do, construct an additional track. Authority for this conclusion will be found in People v. L. & N. R. R. Co., 120 Ill., 48, and L. S. & M. S. Ry. Co. v. B. & O. & C. R. R. Co., 149 Ill., 272.

Yours very truly,
CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:
EDWARD F. BRUNDAGE,
Corporation Counsel.

In re LEGALITY OF APPROPRIATION BY THE CITY COUNCIL FOR PAYMENT TO THEIR FAMILIES FOR A LIMITED PERIOD OF SALARIES OF FIREMEN WHO LOST THEIR LIVES IN THE STOCK YARDS FIRE.

JANUARY 9, 1911.

HON. WALTER H. WILSON, Comptroller.

Dear Sir:

Your verbal request to this department for an opinion as to the legal right of the City Council to appropriate moneys for the payment to the families for a limited period of the salaries of firemen who lost their lives in the Stock Yards Fire, has been referred to the writer for reply.

While we, in common with yourself and all other members of the city government, are in deep sympathy with the proposed action, we must all be governed by our legal rights in the matter, and for guidance must look to the provisions of the Cities, Towns and Villages Act to ascertain the authority of the City Council in the premises.

By Clause 2 of Section 62 of the above Act, the City Council is granted the power "to appropriate money for corporate purposes *only,* and provide for payment of debts and expenses of the corporation." It is a well established rule of law that the funds of a municipality are held by the officers thereof in the nature of a trust fund, and any diversion of such fund to other than corporate purposes would be considered a perversion of such public trust. This rule has been well stated by our Supreme Court in the case of Washingtonian Home v. Chicago, 157 Ill., p. 414, wherein the court, at page 428, says:

"The revenues of the City of Chicago arising from licenses, from taxation and from all other sources, are owned by the City and held by it in trust, to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of a city, or by the city council, to any person they may think entitled to the same, but, on the other hand, such revenues can only be paid out or appropriated by the city council or its officers in the manner and for the purposes authorized by law."

It is clear that the proposed appropriation is not for the payment of salaries earned or to be earned and therefore would

not be an appropriation for a corporate purpose, but would clearly be a donation to the beneficiaries thereof of the sums included in such appropriation, and under the statute and under the decisions of the courts would be unlawful.

I must, therefore, with great reluctance, advise you that the City Council cannot legally make the appropriation for the purposes intended.

Yours very truly,

OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

NOVEMBER 10, 1909.

In re CLAIM OF GEORGE W. JACKSON, INC., FOR ADDITIONAL WORK ON INTERMEDIATE CRIB.

HON. B. W. SNOW, Chairman Committee on Finance.

Dear Sir:

We have your letter regarding claim of Geo. W. Jackson, Inc., for compensation for work done in the rebuilding of the intermediate crib at Seventy-first street, and in which you ask for an opinion upon the following questions:

1. Is the City of Chicago legally liable for the Jackson Company's claim for crib reconstruction in the absence of council action confirming the same?

2. Can the City of Chicago by general ordinance compel contractor engaged in work similar to that now carried on by the Jackson Company at the intermediate crib to provide more tug service for the protection of life and safety of employes at such crib than is required by the contract under which the work is being done, the additional service to be paid for by the contractor?

The contract provides that "should the Commissioner of Public Works deem it proper or necessary, in the execution of the work, to make any alterations which shall increase or diminish the expense, such alterations shall not vitiate or annul the contract or agreement hereby entered into, but the said Commissioner shall determine the value of the work so added or

omitted, such value to be added to or to be deducted from the contract price, as the case may be.

Clause 46 in the specifications provides that "the crib shall be built substantially as shown on plans and sections for this work, sheets 5, 6, 7, 8, 9 and 10."

In speaking of the intermediate crib, clause 115 of the specifications says "this part of the work consists in constructing a hexagonal timber and stone filled protection crib at the location hereinbefore specified and in sinking in the centre of same a temporary working shaft in accordance with accompanying plans and the following specifications," etc.

In the case of *Roemheld v. Chicago,* 231 Ill., 467, which was a suit to recover for additional material furnished for certain bridges, the contract provided that no claim for extras would be allowed unless the extras were first ordered in writing by the Commissioner of Public Works, and there was no such order in existence. Moreover, the ordinance in force then and now provides that no claim for extras shall be allowed unless the extras are ordered by the City Council and the price fixed by the council. There was in that case no council order for the additional material and no order by the Commissioner of Public Works directing that the additional material be supplied, but after the contract was made the plans were changed so that in order to construct the bridge according to the amended plans it was necessary to furnish this additional material and the Supreme Court held that the city was liable for it, even though there was no order or ordinance authorizing it.

The same doctrine is laid down in the cases of *Messenger v. Buffalo,* 21 N. Y., 196; *Kingsley v. Brooklyn,* 78 N. Y., 200, and *Wood v. Ft. Wayne,* 119 U. S., 312.

We find that on May 11, 1909, the Commissioner of Public Works addressed a letter to the contractor enclosing plans and specifications for the reconstructing of intermediate crib in accordance with the recommendations of the Dynamite Commission and asked the contractor what, if any, part of the increased cost should be borne by the city. To this letter the contractor replied under date of May 15, 1909, stating that a summary of the materials required over and above that called for by the contract and original specifications, showed the total cost to be

$18,389.30, and stating, that while it was not their desire to have it understood that they are receiving extra payment over the contract price, it was their opinion that they should be compensated for this extra material, and further that they should also be compensated for the extra tug at the rate of $60.00 per day.

We understand from the letter addressed to your committee September 24, 1909, by the Commissioner of Public Works, that the Commissioner ordered the contractor to proceed with the work and that this work does not include any part of the reconstruction as shown on the contract drawings, but covers only work and material required by the recommendations of the Dynamite Commission. The Commissioner further states that the coroner's jury recommended that boats be kept at the crib ready for service and he was of the opinion that the city should allow for one extra tug for such time as it would be deemed necessary between November 1, 1909, and April 1, 1910, at the rate of $60.00 per day.

We are of the opinion that the facts recited bring this claim within the rule laid down in the Roemheld case and the city is liable for the extra material it required the contractor to furnish, even though the City Council has not acted upon the matter.

To your second question we answer, that while it is true as a general proposition that the city may by ordinance passed under its police power, compel contractors to go to expense in order to make their work safe, no such ordinance is valid unless the court can see that it is a reasonable requirement. What is a reasonable requirement is a matter to be determined by the court. We would direct your attention to the fact that, although other cribs have been built by the city, no fire or explosion occurred at any of them, and we are doubtful of the validity of an ordinance, requiring this contractor to go to the expense of maintaining an additional tug, for the reasonableness of the requirement does not appear to be clear.

We return herewith all papers submitted by you.

Yours very truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:
ROBT. N. HOLT,
Acting Corporation Counsel.

In re RIGHT OF CITY TO CHARGE FOR WATER CONSUMED DURING PERIOD THAT DEFECTIVE METER WAS IN USE WHEN THE INCIPIENCY OF THE DEFECTIVE CONDITION CANNOT BE ASCERTAINED WITH CERTAINTY.

MARCH 31, 1909.

MR. W. J. MCCOURT, Superintendent of Water.

Dear Sir:

Replying, by direction of the Corporation Counsel, to your communication of March 29th addressed to him, I beg to advise you that the water ordinances of the City of Chicago are, in effect, a contract between the city on the one hand and each individual consumer on the other. Section 2379 of these ordinances provides:

"Every consumer of water and every owner, occupant or person in possession, charge or control of any building, structure or premises supplied with water through the Chicago water works system shall be governed by and be subject to the provisions of this chapter and such rules and regulations as may from time to time be adopted and approved by the City Council governing or concerning the use of water. It is hereby made the duty of the Commissioner of Public Works to enforce the provisions of this chapter and of such rules and regulations as may be adopted as aforesaid."

Section 2477 of these ordinances provides:

"If at any time a water meter shall fail to register the quantity of water used or flowing through same, the quantity used or flowing through such meter shall be determined by making an average of the twelve readings last preceding the discovery of the defect in such water meter, and a charge shall be made for the period during which such meter failed to register or during which such defect existed, based upon such average, unless it shall be made to appear by evidence satisfactory to the Commissioner of Public Works that the conditions during such period were materially different from those which existed during the period covered by the last preceding twelve readings. In case it shall appear that the conditions were such during the period of such failure or defect that a greater amount of water was used than would have been used if no change in conditions had taken place or that a lesser amount of water was used during such

period on account of changed conditions, the Commissioner of Public Works shall make a charge for the water used during such period, based upon the amount of water estimated to be used during such period as shown by the evidence submitted to him."

It is the latter section that governs the subject matter of your inquiry.

The defect in the meter in question was discovered at the time that the meter was removed, and, if we are to assume that the defect in question had existed for a considerable period of time prior to the date on which it was discovered, it is manifest that an estimate of the quantity of water consumed for the period of, say five years last past, based on the last twelve readings preceding the date of the removal of the meter, would not be indicative of the quantity of water actually consumed. That is, it is clear that the twelve readings last preceding the discovery of the defect should not be used as the basis of an estimate if it is apparent that said twelve readings are not themselves a true indication of the quantity of water consumed during the various periods intervening between each reading and the one next preceding it.

It seems, then, that but one alternative is left for consideration, and that is that the "Commissioner of Public Works shall make a charge for the water used during such period, based upon the water estimated to be used during such period as shown by the evidence submitted to him."

The position of the Commissioner of Public Works in this regard is not unlike that of an architect named in a building contract as the person who is to determine the amount due from one person to another, or to settle any disputes that may arise between the contracting parties.

I would, therefore, suggest that you collect such evidence as is obtainable concerning the probable duration of such defect, with such evidence as you may be able to obtain concerning the quantity of water consumed during such period and not registered, and when you are prepared to present such evidence to the Commissioner of Public Works, that you notify the consumer of the time and place of such intended presentation and thereby afford to him an opportunity to be heard by the Commissioner on the subject in controversy.

I am of the opinion that the decision of the Commissioner on this subject might not be binding on the consumer unless you afforded to him an opportunity to be heard relative to the controversy.

In *Young v. The Wells Glass Co.*, 187 Ill., 626, it was held that an architect's certificate of damages, based upon matters outside of the contract, and upon the *ex parte* statements of one party without notice to the other is void and not admissible in evidence in an action for the amount due under the contract.

Very respectfully,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 4, 1910.

In re WIRE SIGN ATTACHED TO OUTSIDE WALL OF EIGHT-STORY BUILDING EXTENDING EIGHTEEN FEET OVER SIDEWALK AT NOS. 329-331 FIFTH AVENUE.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

Your letter of May 2, 1910, to Edward J. Brundage, Corporation Counsel, requesting an opinion as to whether a wire sign at Nos. 329-331 Fifth avenue, which it attached to the outside wall of an eight-story building at the roof, and which extends out over the sidewalk eighteen feet, comes within the provisions of the billboard ordinance, and whether or not your department has any jurisdiction over the matter, has been referred to me for answer.

Since this structure is attached to the roof of the eight-story building, in my opinion, the Department of Buildings has jurisdiction over the matter and the erection and construction of said wire sign comes under either the billboard and signboard ordinance of January 2, 1907, as amended, or under the provisions of Section 2181a of the Revised Municipal Code of Chicago of 1905 as amended February 3, 1908, relative to illuminated roof signs.

The wire sign concerning which you ask an opinion is in violation of said Section 2181a in that said section provides:

"No such sign hereafter constructed shall be constructed less

than 6 feet from the edge of the roof of the building or structure upon which the same is erected,"

and it appears from your statement that this sign is closer than 6 feet from the edge of the roof of the building on which it is erected, and does, as a matter of fact, extend out 18 feet over the sidewalk, and that the same is in violation of the requirements of said Section 2181a, as amended February 3, 1908.

Said wire sign is in violation of the second paragraph of Section 705 of the billboard and signboard ordinance, which provides:

"No billboard or signboard shall be anchored to, fastened to or situated above or upon the roof of any building more than two stories in height; and no billboard or signboard shall be anchored to, fastened to or situated above or upon the roof of any building having other than a flat roof.

"No billboard or signboard such as is described in this section, whether anchored to or fastened to any building or situated above or upon the roof thereof shall be constructed and put in place unless in accordance with the plans and specifications which have been submitted to and approved by the Commissioner of Buildings."

Section 709 of the billboard and signboard ordinance requires that a permit shall be secured from the Commissioner of Buildings before any billboard or signboard such as described in this article (Art. XIII) shall be erected or maintained within the city. Said Section 2181a, relative to illuminated roof signs, also requires that a permit shall be taken out by any person or corporation desiring to erect an illuminated roof sign.

Section 702 of the Revised Municipal Code of Chicago of 1905, which contains requirements relative to the use of streets for building purposes, provides:

"Streets and sidewalks may be occupied for the purpose of building only in connection with the actual erection, repair, alteration or removal of buildings, and permission for such occupancy shall terminate with the completion of such operation. It shall be unlawful to occupy any sidewalk or street after the completion of the operation for which a permit has been issued by the Department of Buildings. * * * "

It was held in the case of *Hibbard, Spencer, Bartlett Com-*

pany v. City of Chicago, 173 Ill., 91, that the public streets of a city are dedicated to the public for public use, subject to the control of the City Council; and that the city has no power to authorize the erection of a permanent structure such as the one in question extending out over a public street.

"The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection of a permanent structure."

"A permanent encroachment upon a public street for a private use is a purpresture, and is, in law, a nuisance."

Wood on Nuisances, Secs. 251-260-262.

Quoted with approval in,

Hibbard, Spencer, Bartlett Co. v. Chicago, supra.

In conclusion I am of the opinion that a permit should have been secured by the owner of said sign before the same was erected and that the location and construction of said sign is in violation of the ordinances of the City of Chicago, and that there is a further violation of law in the construction, erection and maintenance of said sign on account of the fact that it extends 18 feet out over the sidewalk.

On account of the several violations of the ordinances above referred to, in my opinion, this sign, as now erected, without any permit and extending over the public sidewalk and street, constitutes a public nuisance, and as such should be abated, and that you may legally serve notice on the owner of said sign and on the owner or owners of the building at Nos. 329-331 Fifth avenue to remove said sign within a reasonable time and on their default in so doing that you may order the same removed by the Fire Marshal of the city.

On account of the extension of this sign out over a portion of a public sidewalk and street, in my opinion, the Department of Public Works has concurrent jurisdiction in this matter and action in the premises may be taken either by your department or the Department of Public Works.

Yours truly,

WM. S. STAHL,
Assistant Corporation Counsel.

Approved:
ROBERT N. HOLT,
Acting Corporation Counsel.

MAY 24, 1910.

In re EXTENSION OF LADDER FIRE ESCAPES FROM FIRST STORY TO THE GROUND OR STREET.

HON. MURDOCH CAMPBELL, Commissioner of Buildings.

Dear Sir:

Your letter of the 11th inst., addressed to Edward J. Brundage, Corporation Counsel, requesting an opinion as to whether or not, as a matter of public safety, you have authority to compel the owners of buildings already equipped with ladder fire escapes extending from the top to the first story to equip same with a counterbalance section extending down to the ground level, has been referred to me for answer.

In reply, I beg leave to state that under the present building ordinances, ladder fire escapes are by Section 392 permitted on four-story Class VI buildings only in those cases where each separate apartment shall have direct access to at least two separate flights of stairs leading to the ground, but where such apartment shall not have access to such flights of stairs, then every tenement house four or more stories in height shall have a metal stairway fire escape securely fastened to the walls of the building and not less than two feet wide, with proper handrailings, instead of the usual vertical ladder.

The requirements of Section 392 relative to ladder fire escapes in Class IV buildings are substantially the same as the requirements of Section 675. Section 675 requires that all buildings four or more stories in height shall be provided and equipped with one or more stairway fire escapes, but excepts therefrom any building used exclusively for a private residence and having two flights of stairs leading from the ground to the top story of the building, and further excepts from that requirement "any building of Class VI, four stories in height, in which each occupant shall have access to at least two separate and distinct stairways from the top floor to the ground, a combination standpipe ladder fire escape may be allowed." This said Section 675 also contains the further exception in regard to existing buildings as follows:

" * * * And provided also that the buildings now in existence having a sufficient number of stairways properly located

and which are now equipped with ladder fire escapes shall be exempt from the provisions of this section."

There is nothing in the ordinances above quoted which specifies where the lower portion of said fire escapes shall end in those cases where ladder fire escapes are permitted to be erected or maintained on buildings, but the location and manner of the construction of such ladder fire escapes are subject to the approval of the Commissioner of Buildings.

The primary purpose for which ladder and stairway fire escapes are placed on buildings is that they may be used as a means of exit in case of fire, panic or other catastrophe. Stairway fire escapes are almost universally equipped with a counterbalance drop extending from the first story to the ground and a great many ladder fire escapes are not thus equipped and terminate at the second story floor and there is no means of getting from there to the ground except by jumping, which as you state is extremely dangerous, and in my opinion you may require a counterbalance drop or other approved means of exit to be placed at the point where said ladder fire escape terminates at or near the second story of said building and have it extend to the ground by suitable mechanical device or devices, but these counterbalance drops or extensions from the second story of the building to the ground should not be required to be placed on buildings now in existence having a sufficient number of stairways properly located and which are now equipped with ladder fire escapes except in those cases where such extensions are necessary "in order to promote the safety of the occupants of such building, and of the person using the same and of the public."

Answering your further inquiry as to when and in what instances you can require additional safeguards and means of exits on buildings erected prior to the passage of these fire escape ordinances, I beg leave to call your attention to an opinion given by Mr. George E. Dierssen of this department April 19, 1910, in regard to additional stairways and fire escapes on existing buildings.

Yours truly,

WM. S. STAHL,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

JUNE 18, 1909.

In re VACATION OF ALLEYS IN BOAL'S SUB., SEC. 9-38-14.

HON. JOHN J. HANBERG, Commissioner of Public Works.

Dear Sir:

On May 11, 1909, this office rendered an opinion relating to the above subject upon a communication approved by you and coming from Mr. John D. Riley, Superintendent of Maps.

This opinion was based upon facts supplied mainly by the Ward Superintendent of the Thirtieth Ward, in whose district the property in question is located.

I am now in receipt of a letter from this gentleman wherein he corrects his former statement, and since this correction involves a material difference in the facts, I deem it my duty to adjust my opinion to the new facts, as disclosed in this statement.

The plat of the subdivision in question was made by Henrietta A. Boal and was recorded June 11, 1898, as document No. 2709656, and is in full compliance with the statute. Part of this plat, including some alleys, was vacated by instrument dated February 19, 1909, and recorded on the same day as document No. 4330760. This vacation instrument contains a statement that the alleys of said vacated portion have never been laid out according to law by the corporate authorities of the City of Chicago.

The facts now submitted show that Union avenue, the western boundary of the subdivision and of the vacated portion thereof, was improved and paved in 1907 by the Barber Asphalt Paving Company, and that combination gutters and asphalt crossings were run around and to the lot lines of the alley in question and also of Fiftieth street, the only two public ways in said subdivision opening into Union avenue. That about the middle of January, 1909, the City Engineers surveyed and staked out the street and alleys in this subdivision, and finding some of the stakes gone, new stakes were placed in April following.

The statement also says that the ward records show that the filling of the alley in question was begun on February 15, 1909, with six loads of material, three loads by teams owned by Henry Bomar, No. 4956 Dearborn street, and three loads by teams

owned by James Hastings, No. 4413 Butler street, and the filling and grading was continued from time to time.

It seems that in consequence of such staking, filling and grading, the alley in question was vacated by the owner of the adjoining property.

In my opinion, the curbing, grading and paving of Union avenue, with the curbing and crossing running into the alleys and streets of this subdivision, alone was a complete acceptance of all the streets and alleys therein.

Village of Lee v. Harris, 205 Ill., 428.

And the staking, filling and grading of the alleys before the filing of the vacation instrument was as complete an acceptance of the dedication as acts without words could make it.

I, therefore, hold that the vacation instrument in question should be held void and without legal effect; that the alley in question is a public alley properly dedicated and accepted; that the city is the owner of the fee simple title thereto; and I would, therefore, advise that steps be immediately taken to recover possession of the alley in question and to remove the vacation instrument from the records as a cloud upon the city's title thereto.

Yours truly,

ADOLPH TRAUB,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 5, 1909.

In re MEADOW LANE AS A PUBLIC STREET.

HON. JOHN J. HANBERG, Commissioner of Public Works.

Dear Sir:

A communication dated April 29, 1909, from Mr. M. J. Doherty, Superintendent of Streets, approved by you, together with letter from Messrs. Rubens, Fischer, Mosser and Rigby, and copy of decree in case of *Bergman v. Mann,* General Number 217909, Superior Court, affirmed by the Supreme Court in 203 Ill., 406, with a request to be advised as to whether Meadow Lane is or is not a public street, was duly received.

From the documents submitted it appears that Otto Berg-

man is the owner of a piece of land bounded on the south and east by a sixteen foot alley, on the west by Meadow Lane and on the north by Pratt avenue, which he acquired with reference to an unrecorded plat of a subdivision showing said streets and alleys.

From said decree and opinion it appears that said Bergman, as such owner, is possessed of, and entitled to, as appurtenant to said land, an easement in and to said streets and alleys and is entitled to have said streets and alleys kept forever open and unobstructed for the use of himself and the public.

Mann v. Bergman, 203 Ill., 406.

It has been held that such an easement is a private right and is not dependent upon acceptance by the public.

Swedish Evangelical Lutheran Church v. Jackson, 229 Ill., 506;

Zearing v. Raber, 74 Ill., 411.

In order that any public rights may be created in the streets and alleys, acceptance, in some form, by the public authorities is essential.

City of Chicago v. Drexel, 141 Ill., 89;

Littler v. City of Lincoln, 106 Ill., 368.

From a personal investigation made by this office it appears that the street in question is in the midst of a prairie which has been plowed and used for market garden purposes, and the investigation does not disclose anything which might be construed into an acceptance by the city or from which an acceptance could be inferred.

My opinion, therefore, is that so far as the city is concerned Meadow Lane is not a public street.

Yours truly,

ADOLPH TRAUB,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

OCTOBER 20, 1910.

In re REMOVAL OF STREET CAR TRACKS, ETC., FOR PROPER ACCOMMODATION OF SEWERS AND DRAINS.

BOARD OF LOCAL IMPROVEMENTS.

Gentlemen:

Under date of October 15 Albert F. Keeney, President of the Board, addressed a letter to the Corporation Counsel in which were propounded five separate inquiries, all bearing on the aforementioned subject. This communication has been referred to me for attention. I herewith respectfully submit the following in reply thereto:

QUESTION 1: Has the Board of Local Improvements the authority to order street railway companies to remove their tracks in order that sewers and drains can be built in accordance with ordinances passed by the City Council with the least possible cost to the persons assessed?

ANSWER: The City of Chicago in making improvements of the character involved in the matter before us is acting under express authority conferred upon it by Clause 7, Section 1 of Article 5 of the Cities, Villages and Towns Act, which reads as follows:

"To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same," and by Clause 29 of the same section, which authorizes the city "to construct and keep in repair culverts, drains, sewers and cesspools, and to regulate the use thereof."

Notwithstanding the fact that on February 11, 1907, the City Council granted to the Chicago City Railway Company and the Chicago Railways Company the right to occupy certain streets with their tracks, and notwithstanding the fact that the ordinances under which these two companies are now operating contain no express language by which their rights in the various streets are subservient to the rights of the public, yet, by operation of law, the City of Chicago has reserved to itself the right to control every public highway in the City of Chicago for the protection of the public health, safety and convenience. This re-

served right is paramount to any private right and is inalienable.

"The duty of the city under its power to repair and improve streets is to fit them for every use contemplated in such way as to best promote the general public welfare."

C., B. & Q. R. R. Co. v. The People, 136 Ill., 660.

The City Council having elected to construct sewers and drains in streets occupied by tracks of the railroad companies, and having passed the proper ordinance for the carrying out of this purpose, can, in accomplishing the end sought—namely, the preservation of public health and safety—require the street car companies to remove their tracks in order that the provisions of the improvement legislation may be carried out.

It is obviously the fact that the ordinances should be so drawn as to cause the railway companies or other public service companies the least possible expense in the removal of their property, for the city's position in this matter would be more secure were the reasonableness of the action by the Board not called into question, yet the judgment of the City Council as to the necessity and character of the improvement, in the absence of evidence of bad faith, must be conclusive.

C., B. & Q. R. R. Co. v. The People, supra.

Dillon on Municipal Corporations (4th Ed.), Sec. 686, 991, Note.

QUESTION 2: If the Board of Local Improvements has the authority above mentioned, how can it compel said railway companies to remove their tracks?

ANSWER: It would be advisable to notify not only the railroad companies but every other corporation that has any surface or underground work laid in the route of the proposed improvement to so alter or rearrange the location of their property as not to interfere with the prompt carrying out of the public improvement contemplated.

This method was adopted, as I recall, in one instance where a sewer was about to be laid in 63d street, and the various companies promptly protected their property within the period named in the notice.

However, if it should happen that the notice is disregarded, the City Council would then have to pass a mandatory ordi-

nance directing the removal of all property belonging to private or quasi-public utility corporations (naming them), and providing specifications for the relocation of the property to be removed. The ordinance should also carry with it a penalty for failure to comply with the terms thereof, and should expressly direct the Commissioner of Public Works to proceed with the removal work at the expense of the various companies in the event that they fail to comply with the ordinance within a certain number of days therein designated.

A mandamus suit might be instituted to compel the companies to proceed with the work above referred to. This, however, would consume considerable time and is not in all respects a desirable way in which to accomplish the result sought.

QUESTION 3: If the Board of Local Improvements can compel the said railway companies to remove their tracks, at whose expense should this be done?

The expense incurred in and about the removal of the railway tracks must be borne by the railway company. "The authorities seem to be in harmony in holding that a city is not liable to companies or individuals having franchises in the highway for expenses incurred by them in readjusting their appliances to meet conditions created by the municipality in making public improvements, where such improvements are made in a reasonable manner, and not so carried on as to cause unnecessary injury, and that the acts of the municipality in causing such expenses do not infringe the constitutional provisions against the taking of property without compensation, the impairment of contracts, or constitute a denial of due process of law."

See: Note, 6 L. R. A., p. 1026.

Of course, it follows that the abutting property owners can not be assessed for the expense incurred by the public service corporations in the performance of such work.

See:

Anderson v. Fuller, 51 Fla., 380.

"In Roanoke Gas Co. v. Roanoke, 88 Va., 810, 14 S. E., 665, it was held that the franchise of a gas company to lay its pipes in the streets of a municipality is subject to the city's right to change the grades of the streets, and that the municipality, in

lowering the grade of its streets, may require the gas company to remove pipes which have thereby become exposed and obstruct the highway; and the court refused to restrain the municipality from moving the pipes which the gas company had refused to remove. In this case the court did not pass upon the question of compensation, as its decision was limited to a denial of relief by injunction, and one of the grounds on which it placed its decision was, that it saw no reason why the alleged injuries 'could not be adequately compensated by law,' to which it added, 'if, indeed, the acts complained of be not *damnum absque injuria*, as would seem to be the case.'"

See: Note, 6 L. R. A., p. 1028.

QUESTION 4: If the tracks are removed on account of the construction of sewers and drains either by special assessment or otherwise, is the City of Chicago, the property owner or the contractor doing the work liable for the cost of replacing said railway tracks, together with such pavements as they may have on their right-of-way which were disturbed by reason of the removal of said tracks?

ANSWER: The answer to this question may be found in the answer to Question No. 3, viz.: That the street car company is liable for the cost of replacing its tracks after the public improvement has been completed.

QUESTION 5: When sewers or drains are built under the recently rehabilitated track construction, has the railway company a right to require a deposit from the property holder or his contractor to reimburse the company for the cost of replacing their tracks or pavements?

ANSWER: The railway company has no right to require a deposit from the property holder or his contractor for the purpose of reimbursing the company for the cost of replacing their tracks or pavements in view of the attitude of the courts as above referred to.

Respectfully submitted,

H. W. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

March 20, 1911.

In re CLAIM OF P. S. OLSEN FOR LABOR AND MATERIALS IN ENGINE PIT OF CHICAGO AVENUE PUMPING STATION REQUIRED BY NON-WATERTIGHT CONDITION OF WALLS.

HON. CHARLES M. FOELL, Chairman Committee on Finance.

Dear Sir:

We have your communication dated March 6, 1911, enclosing correspondence and reports relating to the claim of Peter S. Olsen for $4568.22 for labor and material on the marbelite walls of the engine pit at the Chicago Avenue Pumping Station said to be not included in the City's contract and inquiring whether the City is legally liable for the amount claimed.

From the specifications (page 5), it appears that the contractor was to build concrete walls around the engine pit inside of an existing steel shell, and to face said walls with marbelite slabs. Various provisions of the specifications such as those relating to the use of Star Stettin waterproof cement and preventing the leakage of ground water from below the wall indicate an intention that the work shall be watertight, but the manner of doing it is minutely specified and it is also provided in the contract that work shall be done under the immediate direction and superintendence of the Commissioner of Public Works and to his satisfaction.

In a report to the City Engineer, dated December 28, 1910, Col. Henry A. Allen, now consulting engineer for the City, states that the concrete walls were built in accordance with the specifications of the City, but that they were not in fact watertight. This also appears from the report of Karl L. Lehman, Chief Designer, dated January 11, 1911. When the marbelite slabs were first applied, however, it appears from Mr. Lehman's report that no leakage was observed, owing to evaporation caused by the warmth of the engine room, but when the slabs were set in place many of them were forced off by the accumulation of water coming through the concrete. There ensued attempts which were planned and directed by representatives of the City Engineer to drain the walls of moisture by cutting furrows or gutters in the concrete, which were finally successful and enabled the marbelite facing to be securely set in place.

We understand this claim to be for the increased expense incurred by Olsen in actually completing the work over what it would have cost if the concrete walls had been watertight.

The first question is whether the contractor himself assumed the risk of producing watertight walls, or whether he was entitled to rely upon a compliance with the specifications to reach this result. We understand the rule to be that where a contract calls for work to be done in accordance with definite plans and specifications, even though it is provided that the same shall be watertight, the contractor does not assume the responsibility that this result will be produced, and is not required to do more than comply strictly with the plans and specifications for the work. In a similar case recently decided by the United States Circuit Court of Appeals, it was said:

"The owner having assumed to say by the specifications what was to be done, the contractors were relieved so far as they complied therewith. They guaranteed, not the sufficiency of this to produce the desired result, but merely the effectiveness of what they themselves did under it."

Bush v. Jones, 144 Fed., 942, citing:
McKnight Co. v. Mayor, 160 N. Y., 72.
Filbert v. Philadelphia, 181 Pa., 545.
Harlow v. Homestead, 194 Pa., 57.
See also:
Dwyer v. New York, 79 N. Y. Supp., 17.
Langley v. Rouss, 82 N. Y. Supp., 1082.

For the above reason we do not think that the contract fairly included this unforeseen expense incurred in completing the work.

The only other question to be considered seems to be whether this claim falls within the contract provision for extra work. The contract here provides that no payment shall be made for any extra work *not specified in the contract* without the authority of the City Council. It would appear, however, that Olsen's claim is not for new or extra work "not specified in the contract," nor is it based upon any alteration in the plans and specifications. It is, for the most part at least, for the additional labor and material used in repeatedly facing the same walls and made necessary by the failure of the plans and speci-

fications to produce watertight walls as contemplated. Olsen did no work which was not specified in the original contract, but was required to do it several times. As appears from the Lehman report, the work of draining or ventilating the walls was done by the City's own stone cutter.

The claim, instead of being for extras, is rather for damages on the theory that the City has improperly required the contractor to furnish labor and materials which, although necessary to complete the work, were not, as we have tried to show, fairly included in the contract.

A case involving substantially the same principle was recently decided in New York, the court holding that a contractor who is ordered by the city to do work which the contractor claims is outside the contract may, where the construction of the contract is open to some doubt, do the work as directed, under protest, and treat the conduct of the city as a breach of contract for which he may recover damages. (*Borough Const. Co. v. New York,* 93 N. E., 480.) It was there said:

"The underlying justice of the principle is that where a municipal representative having authority to speak for it and supposed to be familiar with such matters in apparent good faith and with a show of reason requires a contractor to do certain things as covered by his contract, the contractor, although protesting against the requirements, ought not to be compelled to refuse obedience and incur the hazard of becoming a defaulter on his contract even though it shall subsequently turn out that he was right and the municipal representative wrong in the dispute. The theory involves the idea that the requirements of the municipal representative finds some reasonable basis in the contract, and that the question whether his demand is proper or improper is one which may be the subject of some doubt and debate, and in respect of which the contractor might prove to be mistaken if he should refuse to do what was required of him."

There is evidence of a verbal protest on the part of Olsen in July, 1908, when he was first ordered to commence his work, and again in a letter sent by him to the City Engineer, in July, 1909. In view of the power reserved to the City to forfeit the contract for failure on the part of the contractor to follow instructions, and in view of the uncertainty at the time whether

the instructions given to Olsen were reasonable and proper, we believe that, when ordered to proceed with his work, Olsen was not required to elect whether to refuse and thus lose his chance to do the work, or, by complying, to waive his right to claim damages for labor and materials not due under that contract. We believe that he has a claim for damages for the value of labor and materials furnished in excess of what was contemplated by the contract.

Yours respectfully,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

JANUARY 17, 1911.

In re METHODS USED BY THE C., M. & ST. P. RY. CO. IN OPERATING TRAINS BETWEEN ADDISON STREET AND GRACELAND AVENUE, AND KINDRED QUESTIONS.

HON. CHARLES M. THOMSON, Alderman, 25th Ward.

Dear Sir:

In compliance with your request for an opinion as to whether the charter and ordinance under which the C., M. & St. P. Railway Company is operating between Addison street and Graceland avenue are such as to give the company the right to store empty cars along its main tracks and to use such tracks for the purpose of a freight yard and making up its trains for distribution on other parts of the line, I have to say, neither the charter nor ordinance deals with the details of operation of a railroad except in protection and conservation of public rights. A charter is granted by the state. It is the law by which it is created, together with the articles of association adopted in pursuance thereof. It is intended to be sufficiently broad to authorize the corporation to exercise necessary powers, and defines and limits the powers and rights of the corporation as such. It constitutes a contract between the State and the corporation.

An ordinance authorizing the railroad company to use the streets is a mere license to exercise its charter powers and rights therein.

McWethy v. Aurora E. L. & P. Co., 202 Ill., 218.

People v. Central Union Telephone Co., 192 Ill., 307.

This license carries with it the right to do all things reasonably necessary to the exercise of the powers and enjoyment of the rights granted by its charter to the railroad company. Our courts have recognized that a certain amount of noise, dust, smoke and cinders are unavoidable in the operation of a railroad, and must be borne by those living near it without hope of redress, because they are inseparable from the purposes and objects of a railroad.

C. & E. I. R. R. Co. v. Loeb, 118 Ill., 211.

There are certain circumstances, however, under which the police power of the State may be properly invoked to abate objectionable conditions, and where it can be clearly shown that operation at a point is attended by an unreasonable emission of smoke, soot and cinders, or otherwise injuriously affects the public health, comfort or property to such an extent as to amount to a public nuisance, it may be prohibited under this power.

Patterson v. Johnson, 214 Ill., 488.

Harmon v. Chicago, 110 Ill., 400.

Bellevillle v. Citizens' Horse Ry. Co., 152 Ill., 171.

Section 1983, Article III, of the Revised Municipal Code of Chicago, 1905, and Section 2213, as amended January 2, 1906, page 1890 Council Proceedings, deal with smoke and noise, and I beg leave to respectfully refer you to them.

The storing of cars along the company's right of way at points not involving public streets, alleys or ways, is a matter of operation with which the city has no concern, unless it come within the rule of a public nuisance as stated above, and I am of the opinion that, otherwise, the city has no power or authority to interfere with, direct, regulate or control it.

The Council is expressly authorized "to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

Clause 75, Sec. 62, Art. 5, Chap. 24, Hurd's Rev. Stat., 1909.

But this delegation of power does not authorize the Council to arbitrarily declare that a nuisance which is not such in fact, and any ordinance passed in pursuance of it should be subject

to the rule that it must be reasonable, and this could be finally determined only by the courts.

T. W. & W. B. W. Co. v. City, 67 Ill., 47.

As to the tracks running across a public street into property fronting on Seminary avenue, for which you state no ordinance was ever passed, permit me to advise you that under such circumstances the tracks would be in the street without authority of law. No railroad track can be lawfully placed in the streets or alleys of the city without the Council's consent. This consent can be given only in the manner prescribed by the statute, viz., by ordinance.

The power of the City Council in the premises is defined in Article 5 of the city's charter. All powers delegated in and by Article 5 have been held to be legislative in character and require an ordinance as the proper mode of exercising them.

C. & N. P. Ry. Co. v. Chicago, 174 Ill., 446.

I. C. R. R. Co. v. Gilbert, 157 Ill., 354.

Permit me to suggest that, perhaps, you are under a misapprehension as to the facts in connection with the switch tracks in question. Section 1 of the ordinance of the Town of Lake View concerning the Chicago & Evanston Railroad Company, passed October 3, 1881, is as follows:

"That permission and authority be and are hereby granted to the Chicago & Evanston Railroad Company to lay down, maintain and operate a single railroad track or double tracks, with the necessary switches and turnouts, through the Town of Lake View, on a route commencing at a point selected by said company in Fullerton avenue, on the south line of the town, between the east line of Southport avenue and a point six hundred feet east thereof, and running thence northeasterly and north to a point on the north boundary line of the town, three hundred thirty feet east of the center line of Evanston avenue; and in the course of said route to run in the street which runs from Wrightwood avenue to Lincoln avenue on the line midway between Southport avenue and Racine road (or avenue), and in Stella street from Grace street (or Ivanhoe street), its present southern end, to the street known as Sulzer street (or Arnadale road), its present northern end; and to cross all streets and alleys in said route."

It is under and by virtue of this ordinance the tracks in question exist, so that, while there is no separate ordinance directly dealing with the particular tracks involved, I am of the opinion that this ordinance is sufficiently broad to comprehend and include them, and that they are in the streets under and by virtue of lawful authority.

Answering your question as to whether the Chicago, Milwaukee & St. Paul Railway is in Seminary avenue (formerly Stella street), south of Grace street, or on its private right of way, I beg leave to advise you that on February 28, 1867, a strip 80 feet wide was vacated by the legislature, which included the land now occupied by this part of the Chicago, Milwaukee & St. Paul right of way. The beneficiary of that vacation quit-claimed a strip 60 feet wide out of the vacated property to the railroad company. I therefore am of the opinion that at the point in question the road is upon its own private right of way.

Answering the same question as between Waveland avenue (formerly Nellie street) and North Clark street, permit me to say, it appears as a public street on the original plat of the land, which plat was re-recorded by order of court on June 29, 1886, Book 23, page 14, but prior to that time this particular part of right of way was acquired through and by condemnation, Document Number 2888, County Court. Therefore, it, too, is a private right of way.

As to the same question between Grace street and Graceland avenue, I have to say, the road operates through, under and by virtue of the ordinance passed by the Town of Lake View October 3, 1881, accepted September 22, 1882. That part of this ordinance dealing with the route is quoted in full above.

Vol. 2, Special Ordinances, page 504.

In the foregoing the writer has endeavored to answer all questions contained in your various communications, and trusts they will meet the needs of the situation.

Respectfully submitted,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 9, 1910.

In re CLAIM OF MATTHEW WERLE FOR SALARY AS DOG CATCHER WHILE SUSPENDED BY CHIEF OF POLICE.

HON. CHARLES M. FOELL, Chairman, Committee on Finance.

Dear Sir:

Referring to the claim of Matthew Werle for payment of wages as dog catcher during suspension, permit me to say:

The records of the Civil Service Commission show that on September 14, 1908, Matthew Werle was suspended pending investigation of charges. On October 14, 1908, he was reinstated and on the same day again suspended, and on the 14th of each month thereafter he was reinstated and immediately suspended.

Mr. Werle was suspended and reinstated in the manner above described until January 14, 1910, a period of sixteen months, when he was again suspended, and he was tried before the Civil Service Commission on February 4, 1910, which was within thirty days from the suspension of January 14. He was found guilty and discharged by the Commission and afterwards, on March 28, 1910, his discharge was rescinded and he was reinstated in his position on April 9, 1910, but for some reason or other did not draw any salary until about a month later.

I have gone over this matter very carefully with the officials of the Civil Service Commission and have consulted with Mr. Werle. Mr. Werle, if a settlement is made, will waive any claim he may have for salary after his first legal suspension on January 14, 1910, so that the only question to be considered now is the sixteen months from September 14, 1908, to January 14, 1910.

Section 12 of the Civil Service Act reads as follows:

"No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said commission to conduct such

investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days." . . .

Section 3 of Rule VI of the Rules of the Civil Service Commission reads as follows:

"For disciplinary purposes heads of departments shall have power to suspend employes for reasonable periods, not exceeding thirty days. The commission may investigate any such suspension."

It would seem the only warrant for the action taken by the Chief of Police in Matthew Werle's case would be the rule of the Civil Service Commission providing for suspension for disciplinary purposes, and yet a continuation of such suspension for a period of sixteen months, if legal, could be continued indefinitely and would amount to a discharge of an employee without charges being filed or a trial being accorded him, and I am of the opinion that the method pursued in this case of suspension and reinstatement and suspension again every thirty days is clearly an evasion and violation of the letter and spirit of the law and is without warrant and authority.

I am of the opinion that if suit were brought Matthew Werle could recover not only the $1,600 wages for the sixteen months in question at the rate of $100 per month, which was his salary at that time, but that he could also recover wages for the balance of the time during which he drew no pay with the exception of the period from January 14, 1910, until the date of his reinstatement April 9, 1910, and in view of the final disposition of this case, he might be able to recover for the entire period of his suspension.

I, therefore, recommend that this claim be allowed for the sum of Sixteen Hundred Dollars ($1600), the amount of salary due him for the period from September 14, 1908, to January 14, 1910, and that upon making this settlement he be required to execute a receipt and release of the city for any and all claims

arising out of his suspension during the entire period as above set forth.

All of which is respectfully submitted.

Yours truly,

FRANK L. CHILDS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

DECEMBER 15, 1910.

In re REDUCTION OF WATER RATES.

HON. CHARLES M. FOELL, Chairman, Finance Committee.

Dear Sir:

We have your letter enclosing one from the Mayor to the City Council transmitting a communication from the Commissioner of Public Works relative to a reduction of water rates, in which you ask us to point out any terms which may be contained in any of the ordinances authorizing the issuance of water certificates or bonds which might have a bearing upon the city's right to in anywise change the water rates at this time, and the terms of the certificates or bonds which would have a bearing upon that proposition, together with our opinion as to the right to make the proposed reduction if the committee should be of the opinion that the revenue derived under the reduced rate would provide ample funds to operate the water system and make the adequate and comprehensive improvements.

Pursuant to an ordinance passed May 6, 1907, the city issued water loan certificates to the amount of one million dollars, dated May 1, 1907; five hundred thousand being due July 1, 1910, and five hundred thousand being due January, 1911, all bearing interest at the rate of five per cent per annum.

The ordinance of May 23, 1910 (Council Proceedings, 281), recites that the five hundred thousand dollars of the above mentioned certificates maturing July 1, 1910, cannot be met at maturity, owing to a lack of funds, and authorizes, for the purpose of paying such certificates, the issue of water loan bonds to an amount not exceeding five hundred thousand dollars, to bear interest at a rate not exceeding four and one-half per cent,

to become due and payable July 1, 1913. This ordinance expressly provides that "so long as said bonds hereby authorized, or any of them, are unpaid, in either principal or interest, the city shall make no substantial decrease in the rates charged by it to consumers of water." The language quoted is found in the bonds themselves.

An ordinance passed October 7, 1907 (Council Proceedings, 1716), authorizes the issue of water loan certificates to an amount not exceeding five hundred thousand dollars, with interest not exceeding five per cent per annum, the principal to be due November 1, 1912, and this ordinance contains the same language that we have already quoted.

This being the situation, and some of these water loan bonds or certificates remaining outstanding and unpaid, the question arises whether or not it is within the power of the City Council to reduce the water rates.

It is well established that the laws in force at the time a contract is made are part of that contract. *Von Hoffman v. City of Quincy,* 4 Wall., 535, 550; *Butz v. City of Muscatine,* 8 Wall., 575, 583.

The settled rule of law is that it is not within the power of the city, or of the state incorporating that city, to reduce or impair the city's ability to pay according to its contracts.

In *Von Hoffman v. City of Quincy,* 4 Wall., 535, it appeared that the city had issued certain bonds under statutes authorizing the city to collect a tax sufficient to pay the interest upon the bonds, and that subsequently, and after the bonds were sold, the legislature gave the city a new charter allowing a tax for interest on bonded indebtedness at such a low rate that it would not produce sufficient to pay the interest on the bonds, and it was held that the charter was void because it was in violation of the Constitution of the United States, which declares, Article 1, Section 10: "No State shall pass any . . . law impairing the obligation of contracts," the court saying (p. 552):

"Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will

of the individuals. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against invasion. The obligation of a contract is the law which binds the parties to perform their agreement. *The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden.* . . . Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however, minute or apparently immaterial in their effect upon the contracting parties, impairs its obligation. . . . One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, upon its obligation, dispensing with any part of its force."

When the city of Galena was operating under a charter granted in 1852, authorizing the city to levy a tax not exceeding one per cent for the payment of funded indebtedness, the city issued its bonds. When the bonds matured the city was operating under some amendments made in 1857 and 1865, authorizing the collection of one per cent for the payment of interest on the city debt. Upon a petition for a writ of mandamus compelling the city to levy the one per cent tax for the payment of the principal and one per cent tax for the payment of the interest on the debt, the court held that the Act of 1852 was not repealed by either of the other acts and could not be repealed, for it was part of the contract with the bondholder, and the obligation of that contract could not be impaired in any way by subsequent legislation.

In *Murray v. Charleston,* 96 U. S., 432, it is held that when a city issues bonds under a statute authorizing and requiring the levy of a tax for the payment of the principal and interest of the bonded indebtedness, the city cannot impair the obligation of that contract by levying a tax upon the bonds.

In *Peoria Ry. v. People,* 116 Ill., 401, it appeared that Moultrie county had issued its bonds in accordance with the provisions of the special charter of a railroad company which

authorized such action and empowered the county "to levy and collect a sufficient tax on its assessed property to pay the interest on its bonds so issued." Subsequently, a general statute limited the county tax to 75 cents on the 100 dollars' valuation and a special tax not exceeding 100 cents on the 100 dollars' valuation for the payment of interest and principal of bonded indebtedness in existence at the time of the adoption of the present constitution. For the purpose of paying off its bonded debt the county levied a tax of $1.38 on each 100 dollars' valuation of taxable property, upon the belief that the special charter of the railroad company under which the bonds were issued authorized such a levy, and it was held by our Supreme Court that the obligation of the bond could not be impaired by any subsequent legislation, and the tax was sustained, the court saying:

"That it is incompetent for the legislature to pass an act that will impair or substantially diminish the means of enforcing a contract, is too well settled to admit of serious discussion, hence the legislative acts passed after the contracting of a valid debt by a county or other municipal corporation, which, if enforced, would deprive it of the means of payment to any considerable extent—such as a law materially diminishing its powers of taxation—are uniformly held to be in conflict with that provision of the national constitution which declares: 'No State shall pass any . . . law impairing the obligation of contracts.'"

We are of the opinion that so long as any of these water loan certificates or bonds remain unpaid the City Council has no right to reduce the water rates.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

AUGUST 30, 1910.

In re LIABILITY OF CITY FOR RAISING CANAL BOAT ROEBUCK.

HON. B. J. MULLANEY, Commissioner of Public Works.

Dear Sir:

Replying by direction of the Corporation Counsel to your letter of August 29th, beg to advise you that I have been unable to discover any written contract between the City and Great Lakes Dredge & Dock Company relative to subject matter of their bill, and I am informed by the Street Department that no bids were advertised for concerning the work in question.

In this connection I beg to call your attention to Section 39 of the Code of 1905, which is as follows:

"All contracts for work, material, or supplies of any kind or nature, let by any officer of the city, where the amount of such contract exceeds five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same. All such contracts before becoming of any effect shall be approved and countersigned by the comptroller.

Advertisement shall be made and bids submitted and received by the proper officer in the same manner as is provided for the letting of contracts in and by the provisions of Article I of Chapter LII of this ordinance concerning the letting of contracts by the department of public works."

Section 1847, which is a part of Article I of Chapter 52, is substantially the same as the foregoing Section 39.

I am not aware of any item in the appropriation bill passed next preceding the making of any verbal contract might have been attempted relative to the work in question.

In this latter connection I beg to call your attention to Section 91 of the Cities and Villages Act, to be found in Chapter 24 of Starr & Curtis, which is as follows:

"Neither the city council nor the board of trustees, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditure for any improvement to be paid for out of the general fund of the corporation shall exceed, in any one year,

the amount provided for such improvement in the annual appropriation bill; provided, however, that nothing herein contained shall prevent the city council or board of trustees from ordering by a two-thirds vote any improvement the necessity of which is caused by any casualty or accident happening after such annual appropriation is made," etc.

Assuming, therefore, that no appropriation was made to cover the expenditure in question any contract relative thereto would be void unless it has been authorized by a two-thirds vote of the City Council, which was not done in the case before me.

I am, therefore, of the opinion that for the reason indicated payment of the bill presented should be declined.

Very truly yours,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 8, 1910.

In re PAVING AROUND VERNON AND JEFFERSON PARKS.

MR. GEORGE MUGLER, Secretary, West Chicago Park Commissioners, Chicago.

Dear Sir:

Some few days ago you called at this office in company with Alderman Bowler and William Hermann in regard to the paving of the streets around and about Vernon and Jefferson Parks.

As I recall the conversation, you stated that as the City had only surrendered the managing of these parks to the West Chicago Park Commissioners and retained the fee, the Commissioners could not bear a portion of the expense of paving.

I find upon looking into the matter that on October 9, 1885, the control of Jefferson Park was transferred to the West Chicago Park Commissioners and accepted by the Commissioners October 12, 1885.

Vernon Park was transferred October 12, 1885, and accepted November 9, 1885.

These ordinances were passed in accordance with provisions

of Section 1, Paragraph 60 of an Act entitled, "An Act to enable Park Commissioners having control of parks to take, regulate, control and improve parks now under the control of incorporated cities, villages or towns." Approved and in force April 11, 1885.

There is no way that I can discover in the statutes by which the fee itself can be conveyed to the West Chicago Park Commissioners, nor do I think it at all necessary for the purposes under consideration.

The Supreme Court of this State in construing this Act has said:

"Various streets and parks formerly under the control of the city have, by virtue of the park acts, been transferred to the park board, to be held by it in the same manner, and while, as to such streets and parks, there has been a change in the municipal authority having control, there has been no change in the public entitled to their use, and in case they should ever pass from the control of the park board, the statute provides that they immediately revert to the city. It would thus seem that while the park board is the instrumentality created by law for controlling and maintaining the parks, the public for which they are held is the entire city, as well as the west town of Chicago."

W. Chicago Park Com'rs v. Chicago, 152 Ill., 392, at pp. 410-11.

At the last session of the Legislature an Act was passed permitting the Park Commissioners to enter into an agreement with cities from time to time for the payment to the city by said Park Commissioners of a portion of the cost that may be agreed upon, of such improvements or repairs of streets.

In view of these facts I can see no further necessity for any action on the part of the city. If the streets surrounding these parks are about to be improved, I think nothing more is necessary than for the West Chicago Park Commissioners to agree with the Board of Local Improvements upon a division of the cost of such improvements.

Yours very truly,

EDWARD J. BRUNDAGE,

Corporation Counsel.

In re BAR PERMITS FOR PICNICS.

JUNE 27, 1910.

HON. FRANCIS D. CONNERY, City Clerk.

Dear Sir:

The Corporation Counsel has referred to me for an opinion your communication of the 25th inst., wherein you ask to be advised as to whether, under the provisions of an ordinance passed by the City Council on June 6, 1910, regulating the issuance of bar permits, such permits may be issued for the sale of liquor at picnics as well as at public halls.

Section 1 of said ordinance provides as follows:

"The Mayor of the City of Chicago is authorized and empowered, upon written application, accompanied by a good and sufficient bond and the payment of a fee as hereinafter provided, to issue a bar permit for the sale or dispensing at retail, of vinous and malt liquors, to any corporation, voluntary association or society of persons organized in good faith for fraternal, educational or charitable purposes, or to any person or persons for such sale or dispensing at retail of vinous and malt liquors at any gathering or entertainment held by any such corporation, voluntary association or society."

There appears to be no restriction imposed as to the place for which such bar permits may be issued, the language relating thereto being "at any gathering or entertainment held by any such corporation, voluntary association or society."

I am therefore of the opinion that a permit for the sale of liquor at picnics may properly issue under this ordinance.

Very truly yours,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

In re AUTHORITY OF THE OFFICERS OF THE HEALTH DEPARTMENT TO REFUSE TO APPROVE WORK DONE BY UNLICENSED PLUMBERS AND TO PREVENT THE DOING OF SUCH WORK.

WILLIAM H. LUTHARDT, ESQ., Secretary, Board of Examiners of Plumbers, Chicago.

Dear Sir:

Your letter of the 15th inst., in which you inquire concerning the above entitled matter, has been referred to me, and in reply I beg to say:

1. Section 5 of the Act of June 10, 1897, is as follows:

"Each city, town or village, in this State, having a system of water supply or sewerage, shall by ordinance or by-law within three months of the passage of this Act, prescribe rules and regulations for the materials, constructions, alteration and inspection of all plumbing and sewerage placed in, or in connection with, any building in such city, town or village; and the board of health, or proper authorities, shall further provide that no plumbing work shall be done, except in case of repairing leaks, without a permit being first issued therefor, upon such terms and conditions as such city, town or village shall prescribe."

Section 1609 of the Revised Municipal Code of Chicago of 1905 is as follows:

"Any plumber who has not complied with the provisions of this article and obtained the certificate described in Section 1608, or a certificate from a board of examiners of plumbers of any other city, town or village in accordance with the provisions of an Act of the legislature entitled 'An Act to provide for the licensing of plumbers and to supervise and inspect plumbing,' in force July 1, 1897, shall not be entitled to have his work inspected and approved by the department of health; and said department shall not inspect or approve any work done by any plumber who has not obtained such certificate."

Section 1729 of said Code is as follows:

"When the plumbing in a building is completed the plumber or his representative shall secure for the owner of such building from the commissioner of health a certificate of

inspection, signed by the chief sanitary inspector and approved by the commissioner of health, certifying that the plumbing work has been properly inspected and tested as required by the provisions of this chapter."

In view of the above quoted provisions of the statute and ordinances I am of the opinion that the sanitary inspectors have the power and authority to refuse to inspect and approve the work done by unlicensed plumbers, and the Commissioner of Health and the Chief Sanitary Inspector have the power and authority to withhold the certificate of inspection provided for in Section 1729 above quoted.

2. The sanitary inspectors of the Health Department may cause the arrest, on sight or upon warrant, of any unlicensed plumber who is found engaging in the business or work of plumbing within the city, or a suit may be brought in the Municipal Court to enforce the penalty prescribed by the statute or the ordinances of the city.

Very respectfully yours,
CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 31, 1910.

In re WHETHER SALES OF MALT EXTRACTS SUCH AS MALT MARROW, HOFF'S MALT, ETC., ARE REQUIRED TO BE REGISTERED AND REPORTED UNDER ORDINANCE GOVERNING SALE OF LIQUOR IN DRUG STORES.

LEROY T. STEWARD, ESQ., General Superintendent of Police.
Dear Sir:

The attached communication from Roger W. O'Brian, registered pharmacist, 4401 W. Madison street, addressed to you, inquiring whether the sale of malt extracts such as malt marrow, Hoff's Malt, Best Tonic Extract, are required to be registered under the provisions of Sections 781 and 782 of the Municipal Code governing the sale of liquors in drug stores, and

which you transmitted to this department for an opinion, was upon its receipt referred to the writer for reply.

Section 781 of the Code as amended March 14, 1910 (pp. 3456 and 3457, C. P.), provides:

"Any person, firm or corporation obtaining such a permit shall keep a well-bound book in which shall be legibly written in the English language at the time of any sale or gift of any vinous, spirituous, ardent, intoxicating or *fermented* liquors, the date of such sale, the character of the liquor and the amount sold, and the name and address of the person to whom delivered."

In order to determine the exact character of the malt preparations referred to, I secured from the Municipal Laboratory an analysis of such preparations, copy of which I attach. You will note that such analysis discloses that all such preparations are classified as *fermented* liquors. From a reading of the proviso clauses contained in the ordinance and wherein certain sales are excepted from the provisions thereof, it is clear that the sale or gift of malt preparations does not come within any of such exceptions, and I am, therefore, of the opinion that the sale or gift of malt preparations such as are referred to in Mr. O'Brian's letter to you and in the communication from Dr. Tonney, Director of the Municipal Laboratory, are required to be recorded and reported to you under the provisions of such ordinance.

Yours very truly,
OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

CHICAGO, May 27, 1910.

MR. OSCAR H. OLSEN, Office of the Corporation Counsel, 200 Randolph Street, Chicago.

Dear Sir:

Complying with your recent request I have had the following preparations analyzed for the percentage of alcohol. The results are as follows:

Hoff's Malt Extract—
Alcohol by volume..... 3.9 %
Pabst's Extract—
Alcohol by volume..... 3.21%
Mulford's Malt Extract—
Alcohol by volume..... 6.55%
Wyeth's Malt Extract—
Alcohol by volume..... 2.51%
McAvoy's Malt Marrow—
Alcohol by volume..... 3.9 %

All of the samples examined are fermented liquors and have about the same alcoholic content as beer, i. e., ranging from 2% to 6%.

Yours very truly,
(Signed) F. O. TONNEY, M. D.,
Director, Municipal Laboratories.

FEBRUARY 25, 1910.

In re RIGHT OF CITY TO PROHIBIT BILLBOARDS AND SIGNBOARDS ON ROOFS OF BUILDINGS.

HON. B. W. SNOW, Alderman of the 7th Ward.
Dear Sir:

Answering your verbal request for an opinion as to whether the City Council can legally pass an ordinance which will prohibit the erection in the future of billboards and signboards upon the roofs of buildings, I beg leave to call your attention to the charter powers of the City, the judicial construction of those powers and their application to the location of billboards and signboards.

Prior to June 14, 1909, the charter powers of the City were contained within Clauses 66 and 75 of the Cities, Villages and Towns Acts, Chapter 24, Statutes of Illinois.

By Clause 66, the City Council was given the power "to regulate the police of the city or village, and pass and enforce all necessary police ordinances," and by Clause 78, the City Council was given the power "to declare what shall be a nuisance

and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

On June 14, 1909, the Governor approved an act entitled, "An Act granting power to the city council of cities, and the president and board of trustees in villages and incorporated towns to license and regulate advertising by means of billboards, signboards and signs," which provided as follows:

"That the city council in cities and the president and board of trustees in villages and incorporated towns shall have the power to license street advertising by means of billboards, signboards and signs, and to regulate the character and control the location of such billboards, signboards and signs upon vacant property and upon buildings."

Where the State Legislature authorizes the city to exercise the power conferred upon it in a particular manner, the city must act in the prescribed manner and not otherwise.

Litz v. Village, etc., 230 Ill., 310.

Snydacker v. Village, etc., 225 Ill., 154.

City v. Hayward, 176 Ill., 130.

City v. Nichols, 177 Ill., 97.

Donnelly v. Issung, 181 Hun., 352.

City of Chicago v. Pittsburgh, C. C. & St. L. Ry. Co., Docket No. 6934—Agenda 44—December, 1909.

In the case of *Kiel v. City of Chicago,* 176 Ill., 137, the court held:

"The two clauses expressly conferring power to direct the location and to license breweries were to be regarded as containing all the powers granted by the city in that respect, and the enumeration of those powers in those clauses implied the exclusion of other powers, which might have been granted notwithstanding the general clauses of this section, and denied the power of the city to require the agent to take out a license."

This decision was quoted with approval in the recent case of *People v. Busse,* 240 Ill., 338, wherein the court held that the power to tax, license and regulate junk shops did not include the power to direct the location thereof, but that the power expressed was all that the Legislature intended to confer upon the city relative to junk shops.

The power to pass ordinances relative to billboards and

signboards under the general clauses 66 and 75, *supra,* do not enlarge or annul the power conferred by the special provisions of June 14, 1909, above quoted in relation to their various subject matters.

Dillon on Municipal Corporations.

People v. Busse, 240 Ill., at p. 345.

At the time the ordinance was passed and a decision rendered thereon in the case of *City of Chicago v. Gunning System,* 214 Ill., 628, the city had no direct charter power relative to billboards and signboards. The court in that case said:

"We think it clear that either under Paragraph 66 or 75, supra, full power and authority are conferred upon cities, towns and villages to *regulate* the construction and use of billboards within their corporate limits, provided the *regulation* is not unreasonable. . . . Nor will the mere fact that such structures are placed upon private property and not upon public streets, protect those owning or using them against such reasonable regulations. . . . The one essential and universal limitation upon the exercise of the police power is, however, that the regulation shall be reasonably necessary and reasonably exercised. . . .

"The purposes of Sections 4 and 5 seem to be mainly sentimental and to prevent sights which may be offensive to the æsthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards. The extreme restrictions placed on the erection and maintenance of such boards, and the license fee placed thereon, indicate that these sections were intended to be *prohibitive rather than regulative,* and are, in our opinion, unreasonable."

Interpreting the above decision in the Gunning System case, and applying it to billboard and signboard ordinances, in my opinion, our Supreme Court would not uphold a provision in an ordinance which was prohibitive in its nature, such as the prohibition of billboards and signboards upon the roofs of buildings. The specific charter power under which the billboard and signboard ordinance, now under consideration by the City Council, must be sustained, is the act approved June 14, 1909, which gives the City Council the right "to *regulate* the character and *control* the location of billboards, signboards and signs upon

vacant property and upon buildings," and, in my opinion, the City Council can pass valid ordinances controlling the size, construction and location of billboards, signboards and signs upon vacant property and upon buildings, but cannot legally prohibit them from the roofs of buildings.

Respectfully submitted,

WILLIAM S. STAHL,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

In re LIABILITY OF CHICAGO & NORTHWESTERN RAILROAD CO. TO REPAVE APPROACH TO SUBWAY AT ELSTON AVENUE.

OCTOBER 13, 1910.

R. M. COCHRANE, ESQ., Superintendent of Streets.

Dear Sir:

Replying, by direction of the Corporation Counsel, to your letter of October 11, 1910, I beg to advise you that Section 6 of the ordinance of March 28, 1910, which controls the question propounded in your letter, provides that the Chicago & Northwestern Railroad Company may excavate any of the streets referred to in the ordinance when necessary for the work authorized thereby, but that the streets or sidewalks so excavated or disturbed shall be restored as soon as practicable without expense to the City of Chicago. And the section further provides that those portions of any of the subways mentioned in the ordinance or the approaches thereto where grades are changed by this ordinance, or where the existing pavement, curbs or sidewalks require renewal, said railway company shall lay granite block pavement, set curbs and construct sidewalks of suitable material, in accordance with the specifications made by the Commissioner of Public Works of the City of Chicago and to his satisfaction.

If, then, that portion of the approaches in Elston avenue have been disturbed by the company in its operations conducted pursuant to the ordinance above referred to, it is the duty of the railway company to restore them as soon as practicable, or if the company has changed the grade in the subway, or if the

existing pavement requires renewal, it is the duty of the railway company to renew the same with granite block pavement.

I take it from the correspondence before me that something has occasioned the necessity for the pavement or re-pavement of the approach in this subway, but that it is the contention of the railway company that while it is obligated to pave that portion lying within the lines of its right-of-way, it is not obligated to pave that portion lying without the right-of-way lines. This question has, I believe, been determined by the Appellate Court of this State in *City v. P. C. C. & St. L. R. R. Co.*, 146 Ill. App., 403, wherein the court, at page 417, says:

"That the approaches to a viaduct, be they longer or shorter, according to the circumstances and requirements of the particular case, are a part of the viaduct, and also that the sidewalks upon the approaches as well as the sidewalks upon the viaduct proper, are part of the viaduct, are propositions too self-evident and too plainly in accordance with the dictates of common sense to require any reference to the authorities on the subject. The common law does not permit itself to be confined or limited on a subject such as the convenience of the public or the safety of person or property by any such arbitrary lines as the lines of right-of-way of a railroad."

It would seem from the foregoing, therefore, that the railway company is obligated to re-pave such portion of the approach to the subway as is in need of such re-pavement, irrespective of the question as to whether the portion to be re-paved lies within or without the right-of-way lines of said company.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 14, 1909.

In re INSTALLATION OF METERS ON PREMISES OF SUBSCRIBERS TO MEASURED SERVICE.

WILLIAM J. PRINGLE, ESQ., Chairman, Committee on Gas, Oil and Electric Light.

Dear Sir:

In response to your request as to whether the Committee on Gas, Oil and Electric Light has any power and authority in regard to the matter of the installation of meters for measured service lines upon the premises of the lessees or subscribers to such service, I beg to say:

That part of the Chicago Telephone Ordinance which concerns meters on measured service lines is as follows:

"(g) Meters on Measured Service Lines.

The Chicago Telephone Company shall install in connection with each measured service line of its lessees and subscribers a meter which shall prove effective in actual use for accurately and correctly recording the number of outgoing messages or conversations over said line, and at any time that a practicable meter for use upon the premises of the lessee or subscriber in connection with such line shall be devised and prove effective in actual use for accurately and correctly recording outgoing messages or conversations, as aforesaid, the Company shall install the same in connection with each line of its lessees of and subscribers to measured service upon their premises.

If any question shall arise as to whether any meter or meters hereinabove provided for shall reasonably protect the lessee or subscriber in the counting of outgoing messages, or as to whether or not a practicable meter for use upon the premises of the lessee or subscriber to a measured service line has been devised and proved effective in actual use for accurately and correctly recording outgoing messages or conversations, as aforesaid, such question or questions shall be submitted to the Chairman of the Finance Committee of the City Council, the Commissioner of Public Works, and the Corporation Counsel, who shall together hear such facts as may be presented by the parties to the controversy, and they, or a majority of them, are hereby given the power to decide such question or questions, and to

require said Chicago Telephone Company to make such changes in any meter or meters, or the method of operating the same, as they shall deem reasonably necessary to protect the lessees and subscribers of said Chicago Telephone Company to measured service, and to require the installation by said company of a new meter or meters for use upon the premises of the lessees and subscribers, and to take any other action in the premises which they shall deem reasonably necessary to protect the lessees and subscribers of said company."

On May 18, 1908 (Council Proceedings, p. 298), a resolution was passed by the City Council as follows:

"RESOLVED, By the City Council of the City of Chicago, that the said Chairman of the Finance Committee of the City Council, the Commissioner of Public Works and the Corporation Counsel be and they are hereby requested to determine whether or not a practicable meter or meters for use upon the premises of lessees or subscribers to the measured service of said Chicago Telephone Company has been devised and proved effective in actual use for accurately and correctly recording outgoing messages or conversations over the lines of such lessees or subscribers, as provided for by and under such ordinance as aforesaid; and to take such other action in the premises which they shall deem reasonably necessary to protect the lessees and subscribers of said Company, under the terms and provisions of such ordinance as aforesaid."

On November 27, 1909, the Commission named by the ordinance, consisting of the Chairman of the Finance Committee of the City Council, the Corporation Counsel and the Commissioner of Public Works, wrote a letter to President Sunny, of the Chicago Telephone Company, enclosing therewith certain engineers' reports (Council Proceedings, p. 1851). The last paragraph of that letter was as follows:

"We are advised in these reports that a meter has now been devised meeting the requirements of the ordinance, and we hereby order the Chicago Telephone Company to comply with the said ordinance by installing upon the premises of the lessee or subscriber a practical meter which will accurately and correctly record the number of outgoing messages or conversations. Our conclusions are based on the engineers' reports."

Under date November 29, 1909 (Council Proceedings, p. 1903), President Sunny, of the Telephone Company, replied to the letter next above mentioned, and among other things said:

"Since the date of the adoption of the telephone ordinance, November 6, 1907, the Telephone Company has applied itself diligently and continuously to the task of developing and producing a satisfactory telephone meter to be installed upon the premises of the subscriber in connection with measured service lines.

"The inspection and tests of the meter which we have produced have been much more extensive than those described in the supplementary report above referred to, and they warrant us in introducing the meter into the Chicago Exchange for a broader actual service test, in the expectation that it will meet the requirements of your instructions of the 27th inst. to install a practical meter which will accurately and correctly record the number of outgoing messages or conversations.

"We are proceeding accordingly with all possible dispatch."

From the foregoing it seems clear:

(1) The Chicago Telephone Ordinance provides (a) that the Chicago Telephone Company shall install a practicable meter for use upon the premises of the lessee or subscriber at any time, that such a meter shall have been devised and proved effective in actual use for accurately and correctly recording outgoing messages, and (b) that the Commissioner of Public Works, the Corporation Counsel and the Chairman of the Finance Committee have the power under the ordinance to decide whether or not a practical meter, as aforesaid, has been devised and proved effective in the manner provided for by the ordinance, and to require the installation of such a meter.

(2) The Commission consisting of the Commissioner of Public Works, the Corporation Counsel and the Chairman of the Finance Committee, has reported to the Chicago Telephone Company that they have been advised by the engineers' reports that a meter which meets the requirements of the ordinance has been devised, and has ordered the Chicago Telephone Company to comply with said ordinance by installing upon the premises of the lessee or subscriber a practical meter which will accurately

and correctly record the number of outgoing messages or conversations.

(3) The Chicago Telephone Company claims to be now proceeding with the installation of a meter which will comply with the requirements of the ordinance.

In view of these facts I am of the opinion that this Committee has no power or authority to act directly in the matter except to recommend—if it be deemed advisable—to the Council the passage of a resolution confirming the order of the said Commission, as above set forth. Such a resolution will approve the action of the Commission in ordering the installation of such meters.

I am of the further opinion, however, that your Committee has the power and right to inquire and investigate as to the manner in which the Telephone Company is proceeding and what progress it is making in the installation of such meters since the date of Mr. Sunny's letter, and also whether subscribers to measured service lines desire to have such meters installed upon their premises, and to make such reports and recommendations to the Council as may be determined to be advisable.

Very respectfully yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

October 19, 1909.

In re ORDINANCE AMENDING SECTIONS 1972 AND 1973 OF THE REVISED MUNICIPAL CODE.

TO THE HONORABLE COMMITTEE ON LOCAL TRANSPORTATION.

Gentlemen:

Your communication to this office of the 11th inst. inquiring if the subject-matter of the attached ordinance, in re refund of street and elevated carfares, introduced by Alderman Harding, is covered by the Municipal Code or any existing ordinance, and whether, if passed, it would vitally affect any existing provision of any ordinance, having been referred to me, I would say, it simply declares what is understood by sections

1972 and 1973 of the Revised Municipal Code. It expresses what is now left to construction.

I presume this ordinance was suggested by the opinion that elevated railroads are not street railroads.

Our courts have made a broad and clearly-defiined distinction between railroads constructed for general traffic and street railroads.

Dewey v. Railway Co., 184 Ill., 426.

Harvey v. Railroad Co., 174 Ill., 295.

The use made of the street is the test in determining whether it is a street or commercial railroad. If used to facilitate travel in the street it is a street railroad.

Aldis v. Union Railroad Co., 203 Ill. 567.

Harvey v. Railroad Co., 174 Ill., 295.

Newell v. Railroad Co., 35 Minn., 112.

Williams v. Railroad Co., 41 Fed. Rep., 556.

Railroad Company v. Railroad Company, 156 Ill., 255.

Elevated roads in Chicago have been judicially declared street railroads.

Doane v. Railroad Co., 165 Ill., 510.

Phelps v. Railroad Co., 166 Ill., 131.

Strong v. Railroad Co., 166 Ill., 207.

Aldis v. Union Elevated Railroad Co., 203 Ill., 567.

In my opinion the subject-matter of the proposed ordinance is covered by the sections of the Municipal Code it seeks to amend: namely, sections 1972-3. Nevertheless, I am of the further opinion that the proposed ordinance would greatly clarify the situation in that it plainly expresses what is left to construction by the present ordinance.

It can be passed as an amendment to the sections proposed without affecting any other existing provision.

Very respectfully submitted,

GEO. M. BAGBY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

October 6, 1910.

OFFICERS AUTHORIZED TO MAKE PURCHASES AND LET CONTRACTS.

HON. CHARLES M. FOELL, Chairman Committee on Finance.

Dear Sir:

Replying to your inquiry of recent date for information as to what officers and departments of the city now have the right to make purchases and under what circumstances, I beg to say that in the present condition of the Municipal Code the power to make purchases and to enter into contracts is limited to the following officers:

BUSINESS AGENT.] Under section 2240 of the Revised Code of 1905 as last amended December 13, 1909, C. P. 2096, this officer is directed to make all purchases of supplies and materials and to let contracts for labor in cases wherein the cost of such supplies, materials or labor shall be less than $500.00. All purchases or contracts made by the Business Agent must be based upon a requisition approved by the head of the department for which the same is required.

COMMISSIONER OF HEALTH.] By the last named section (2240) he is authorized to purchase or contract for medicinal, preventive and curative supplies and for the printing and publication of information relating to the prevention of disease in cases where the cost of such supplies or printing shall be less than $250.00.

COMMISSIONER OF PUBLIC WORKS.] Section 1842 of the Revised Code of 1905 as last amended June 6, 1910, C. P. 337, makes it the duty of this officer to award and execute all contracts for any work or public improvement the cost of which shall exceed the sum of $500.00, and also all contracts for coal for the use of any department of the city. This grant of power does not relate to the construction of local improvements which are paid for by special assessment. Section 1849 of the Code provides that all contracts exceeding in amount $500.00 for "work, material or supplies" relating to any of the matters under the cognizance of the department of public works shall be let by the Commissioner of Public Works.

SPECIAL PARK COMMISSION.] By section 1558a of the Code which was passed December 20, 1909, C. P. 2377, the

Chairman of the Special Park Commission was given power, with the approval of the Commission, to award and execute contracts for such work, materials and supplies as are necessary in connection with the improvement, maintenance of the parks, play grounds and bathing beaches under the control of said Commission in cases where the amount shall exceed the sum of $500.00. The method of awarding and executing contracts is to be the same as that provided for the department of public works.

INSPECTORS, HOUSE OF CORRECTION.] Section 1316a of the Revised Code was passed December 13, 1909, C. P. 2104, whereby the Board of Inspectors are given power to award and execute contracts for the "ordinary and necessary expenses and repairs of the institution," provided that when the amount of any contract shall exceed $500.00 the same shall be let to the lowest bidder in the manner provided for the letting of similar contracts by the department of public works.

CITY CLERK.] Section 12a was passed December 13, 1909, C. P. 2102, authorizing him to contract for printing and binding the "Proceedings" of the City Council and for such license forms, metal plates and badges as shall be necessary for the issuance of licenses. These contracts are to be let in the manner provided for contracts for materials or supplies of the department of public works.

CITY ELECTRICIAN.] Section 803 of the Revised Code of 1905 was amended December 13, 1909, C. P. 2102, so as to authorize the City Electrician to contract for such materials and supplies as are necessary in the administration of the affairs of his department in cases where the cost of such materials or supplies shall exceed the sum of $500.00. His contracts must be let to the lowest bidder in the manner provided for similar contracts for the department of public works.

FIRE MARSHAL.] Section 830 of the Revised Code of 1905 as amended December 13, 1909, C. P. 2103, confers power upon the Fire Marshal to contract for materials and supplies of his department where the amount thereof exceeds $500.00, which contracts are to be awarded in the manner prescribed for similar contracts of the department of public works.

GENERAL SUPERINTENDENT OF POLICE.] This office under section 1734a, passed December 13, 1909, C. P. 2105,

is given contracting power similar to that of the Fire Marshal. He may let the contracts for materials and supplies of his department in cases where the amount exceeds $500.00 and must follow the method provided for the letting of similar contracts by the department of public works.

Unless expressly authorized by the vote of two-thirds of the City Council, no other officers have at the present time power to make purchases or enter into contracts.

Yours respectfully,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

October 27, 1910.

In re APPLICATION OF SANITARY DISTRICT TO CHANGE DOCK LINE, FILL IN LAND AND BUILD NEW DOCK IN THE CHICAGO RIVER SOUTH OF 12TH STREET.

HON. B. J. MULLANEY, Commissioner of Public Works.

Dear Sir:

Your communication of the 14th instant, addressed to the Corporation Counsel and wherein you ask to be advised whether your department has authority, without Council action, to issue to the Sanitary District of Chicago a permit to change the dock line, fill in a triangular piece of land and to build a new dock in the Chicago River south of 12th street, as set out in an application by the Sanitary District filed with you, attaching plat showing proposed new dock line and also attaching copy of permit from the Secretary of War, dated February 23, 1910, assenting thereto, has been referred to the writer for reply.

The only grant of power to the City Council with reference to this subject matter which I have been able to find is contained in the 30th paragraph of Section 1 of Article V of the Cities, Villages and Towns Act, Chapter 24, Hurd's Revised Statutes, 1909, which reads as follows:

"To deepen, widen, dock, cover, wall, alter or change channel of water courses."

As the proposed dock line as shown in plat contemplates a change from the present dock line, it appears clear that "an alteration or change of the channel of a watercourse" is necessarily involved, and in order to permit this it would require an exercise on the part of the City Council of the charter power above referred to. Our Supreme Court has held that a municipal corporation, in the exercise of powers granted to it by charter, acts in its legislative capacity, and that such action can only be by ordinance.

See: *Chicago & Northern Pac. R. R. Co. v. City of Chicago,* 174 Ill., 439, on page 446.

Also: *The Village of Altamont v. The B. & O. S. W. Ry. Co.,* 184 Ill., 47, on page 51.

This being the case, I am of opinion that your department has no authority to issue the permit requested by the Sanitary District without previous action by the City Council in the shape of the enactment of an ordinance establishing the new dock line.

I have taken up this matter with the representatives of the Sanitary District and have furnished them with a draft of the necessary ordinance to be passed by the City Council.

I return herewith your communication, correspondence and plat.

Yours respectfully,

OSCAR H. OLSEN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

August 19, 1909.

In re UNDERTAKERS' LICENSES.

BERNARD J. MULLANEY, ESQ., Secretary to the Mayor.

Dear Sir:

Replying to your request of August 19, 1909, I beg to advise you that the ordinances relative to application for undertakers' licenses are to be found in Sections 1237 and 1238, as amended February 3, 1908, and appearing in Supplement No. 3 at pages 86 and 87, which sections are are follows:

"1237. APPLICATION—QUALIFICATION.] Any person desiring a license to act as an undertaker, or to prepare dead bodies for burial or cremation, or to manage funerals or be in

charge of an undertaking room or advertise or hold himself out to the public as an undertaker, or to solicit business as an undertaker, shall make application in writing therefor to the Commissioner of Health, setting forth therein the name and residence of such applicant, number of applicant's state embalmer's card and the room, store, or place where such applicant intends to carry on or conduct the business of undertaking. Every such applicant shall also furnish to the Commissioner of Health evidence satisfactory to such Commissioner of such applicant's knowledge of the laws and ordinances of the city and the rules and regulations of the Department of Health governing and concerning the removal, preparation and burial or cremation of the dead, and that such applicant has a practical knowledge of the most approved and sanitary methods of caring for dead bodies and preparing same for burial or cremation including the embalming and disinfection of said dead bodies; said applicant shall further furnish to said Commissioner satisfactory evidence that said applicant is a resident of the City of Chicago, or maintains an undertaking establishment in the City of Chicago, is of good standing in his community, and a fit person to be licensed as an undertaker, and no license shall be issued unless the foregoing requirements have been complied with. If it shall appear to said Commissioner that such applicant possesses the requisite qualifications, and is a fit person to be entrusted with an undertaker's license, said Commissioner shall transmit such application with his approval thereon to the Mayor. Upon receipt of such application, approved as aforesaid, and the payment by such applicant to the City Collector of the license fee hereinafter fixed, the Mayor shall issue, or cause to be issued, to such applicant a license, attested by the City Clerk, authorizing such applicant to carry on, conduct or engage in the business of undertaking, or to prepare dead bodies for burial or cremation, and to conduct and manage funerals, at and from the store, room or place designated in the application, for and during the period of such license: provided licensee may be suspended by said Commissioner of Health for a period not to exceed thirty days, or said license may at any time after the issuance thereof be revoked by the Mayor in addition to any other penalty hereinafter imposed by the ordinance.

"1238. UNDERTAKING ROOMS.] No person shall be licensed to carry on the business of undertaking in any establishment, store or place, unless such establishment, store or place shall be provided with a compartment or room completely shut off, or capable of being completely shut off from the other parts of such establishment, store or place; such compartment or room shall have free outside ventilation and light and its floor shall be constructed of, or covered with a non-absorbent material and shall be connected with a sewer by an approved sanitary drain."

From said sections you will observe that if the applicant is qualified as by the terms of said sections provided, the Mayor should grant the license.

If, as contended by the applicant, the sole ground for the refusal of the license is that a license had heretofore been granted to another person to conduct an undertaking establishment at the same number at which the present applicant proposed to conduct his business, it is error to refuse a license to this applicant as the city is in no wise interested in the question as to whether or not this applicant or some other one has a right to occupy the premises which this applicant proposes to use in the conduct of the undertaking business, and if this applicant obtains a license, and does not acquire from the person owning the premises in question the right to occupy the premises described in his application, the applicant's license will avail him nothing, as he could not under such license conduct an undertaking business at any other place than that named in the application.

I, therefore, advise you that if the applicant is qualified as by the terms of the ordinance quoted provided, a license should be issued to him notwithstanding the fact that a license has at some other time been issued to another person to conduct an undertaking business in the premises described in this applicant's application.

Very truly yours,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

October 7, 1909.

In re VALIDITY OF ORDINANCE PROHIBITING OPERATION OF CARS ON SURFACE TRACKS LYING WITHIN TEN FEET OF ABUTMENT WALL CARRYING ELEVATED TRACKS OVER STREET.

HON. MILTON J. FOREMAN, Chairman Committee on Local Transportation.

Dear Sir:

In compliance with your request concerning the validity of an ordinance prohibiting any person or corporation from operating cars on tracks laid on the surface of a street when the tracks parallel the tracks of a steam railroad which are elevated and the nearest rail of the surface track is within ten feet of the end of any abutment wall supporting bridges leading over a street, I beg to advise you as follows:

It has been held that the operation of cars on tracks intersecting a street at grade in a populous locality constitutes a nuisance which the municipal authorities have ample authority to abate. Under the circumstances contemplated by the ordinance in question, the danger of the grade crossing is accentuated by the proximity of the rails of the surface track to an obstruction by the side of which persons on foot and team traffic must pass without an opportunity to observe the approach of a train on the surface tracks until arriving within ten feet of the point where they may become seriously injured or killed.

Ample and express authority from the Legislature is granted to the City to pass the ordinance in question. Clause 7 of Section 62, Chapter 24, Hurd's Revised Statutes, gives the City authority "to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same."

Clause 9 gives the City authority "to regulate the use of the same."

Clause 66 empowers the City "to regulate the police in the city or village and pass and enforce all necessary police ordinances."

Clause 75 of said section empowers the City "to declare what shall be a nuisance and to regulate the same; and to impose

fines upon parties who may create, continue or suffer nuisances to exist."

In *McPherson v. Village of Chebanse,* it is held that Clause 66, above quoted, confers upon the City power to pass any ordinance of a police nature.

Any ordinance which tends to conserve or promote the public health, safety, welfare or convenience has been held to be a proper exercise of the police power.

Chicago & N. W. R. R. Co. v. City of Chicago, 140 Ill., 309.

C. B. & Q. R. R. Co. v. People, 200 U. S., 561-592.

In *City v. Jackson,* 196 Ill., 496, and *N. Y. & N. E. R. R. Co. v. Bristol,* 151 U. S., 556, it has been held that the City has ample authority under the exercise of its police power to prevent the operation of railroad cars at grade within the municipality.

In the latter case, at page 566, the court says:

"It must be admitted that the Act of June 19, 1889, directed to the extinction of grade crossings as a menace to public safety, and that it is, therefore, within the exercise of the police power of the state."

And again, at page 567 of the same opinion, the court says:

"And as to this Act, the court in 50th Connecticut 552, on this company's appeal, held that the grade crossings were in the nature of nuisances which it was competent for the Legislature to cause to be abated and that it would, in its discretion, require any party responsible for the creation of the evil in the discharge of what were in a sense governmental duties to pay any part, or all, of the expense of such abatement."

In *Standard Oil v. Danville,* 199 Ill., 50, the Supreme Court of this state held that a corporation might be required to cease using that which had become dangerous, although the thing in question was not regarded as dangerous at the time that it was constructed or installed, and that, too, where there had been no change in the construction or use of the thing which the ordinance prohibited, but on the other hand, the danger had arisen by reason of an increased density of population occurring since the construction of the object, the use of which was prohibited by the ordinance.

I am, therefore, of the opinion that the ordinance before

your Committee is a valid exercise of the municipality's police power.

Very respectfully submitted,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

March 26, 1909.

In re REMOVAL OF STREET SWEEPINGS, GARBAGE, ETC., BY MEANS OF STREET CAR.

BOARD OF SUPERVISING ENGINEERS, 181 La Salle St., Chicago.

Gentlemen:

Replying to the request of Mr. George Weston, under date of March 23rd, 1909, that the Board of Supervising Engineers be advised if the street railway companies should be allowed under the ordinances, to operate trailers, or cars in trains, while engaged in removing street sweepings, garbage or other refuse.

The language used in Sections 10 and 14 of the Chicago City Railway Company ordinance is identical to the language used in the same numbered sections of the Chicago Railways Company ordinance, and the pertinent portions of these sections read as follows:

"Section 10. Each electric car shall be in charge and under the control of two (2) competent men, a motorman and a conductor, and (after the expiration of one year from the date of the passage of this ordinance, or at such earlier time as the Company may be able to acquire the necessary rolling stock to enable it to abandon trailers) shall be operated singly."

"Section 14. The Company shall sprinkle, sweep, keep clean and free from snow that portion of each of the streets occupied by its right of way as provided in Exhibit B and if it shall be found practicable to have the streets occupied by its tracks swept and sprinkled their entire width by the Company, or to have street sweepings, garbage or other refuse removed by means of street cars at night, the Company shall perform such service or so much therof as shall prove practicable when so ordered by the Mayor and Commissioner of Public Works and it shall receive for such service reasonable compensation."

It is noted that Section 10 deals with "service regulations" and that the various sub-paragraphs of this section contain the specifications for *passenger cars* operated by the Company. The paragraph of Section 10, above quoted, is included within the aforesaid specifications and from a reading of the ordinance in its entirety, one can come to no other conclusion but that passenger cars was the subject with which the Council intended to deal when it enacted the provision that every electric car should be operated singly.

By Section 14 of the Companies' ordinances, it was the evident intention of the City to impose the obligation upon the Companies to remove street sweepings, garbage or other refuse, by means of street cars at night, or so much thereof as shall prove practicable when so ordered by the Mayor and the Commissioner of Public Works, for which the Companies should receive reasonable compensation.

The fact that this special service is to be performed at night, indicates that it is not to interfere with the passenger traffic, and to be separate and distinct from it.

Ordinances are governed and controlled by the same rules of construction and interpretation as pertain to statutes. It is a familiar rule of construction that words and clauses in different parts of an ordinance must be read in a sense which harmonizes with the subject matter and general purpose of the ordinance.

"In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion." *Kent's Commentaries.*

"Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this

is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated." *Sutherland on Statutory Construction, Section 246.*

I am therefore of the opinion that the Board of Supervising Engineers has ample discretion in determining the most practicable manner of removing street sweepings, garbage or other refuse, either by single cars or by trains, as the Board may decide.

Respectfully submitted,
EDWARD J. BRUNDAGE,
Corporation Counsel.

March 23, 1909.

In re DISPOSITION OF MONEYS PAID CITY FOR SERVICES OF POLICE PATROLMEN.

HON. GEORGE M. SHIPPY, General Superintendent of Police.

Dear Sir:

The Corporation Counsel has referred to me your letter of the 17th instant requesting an opinion as to whether money paid to the city for services of police patrolmen permanently detailed at certain plants or places of business should constitute a part of the police pension fund under the third provision of Section 1 of the Police Pension Act.

That section provides:

"That in each city . . . there shall be set apart the following moneys to constitute a police pension fund: First . . . Second . . . Third. All moneys paid for special detail of police officers . . ."

After careful consideration it appears to me that the word "special" as used in this provision of the statute is to be taken in contradistinction to the word "regular," and that the word "special" is there used rather in the sense of "temporary" than as "permanent" when taken in connection with the words "detail of police officers."

In my opinion, it was not the intention of the Legislature to supply the police pension fund at the expense of the general corporate fund by diverting to the pension fund moneys paid for the services of regular policemen who are paid salaries provided for in the general appropriation for the police department

of the city and who are regularly detailed or stationed permanently at some particular plant or place of business where the surrounding conditions require the services of one or more regular policemen.

However, in the case of special—that is temporary—detail to places where conditions occasionally require the services of one or more policemen, such as dances, picnics, fairs, ball games, etc., I think it was contemplated by the above provision that the money paid the city for such services be set apart to constitute a part of the police pension fund.

To my mind, the test to be applied is whether the detail is regular or permanent, and in such case the money paid therefor should go to the general corporate fund. If, on the other hand, the detail is special and temporary or occasional, the money paid therefor should go to the police pension fund under the provision above quoted.

Accompanying your letter are bills for the services of police patrolmen rendered to the following:

Majestic Theater.
Chicago, Milwaukee & St. Paul Ry. Co.
West Side Elevated Ry. Co.
McGuire & White.
Board of West Park Commissioners.
Illinois State Penitentiary.
Sears, Roebuck & Co.
Chicago Railways Company.

In each of these cases, because of the fact that the detail there is regular and permanent, I am of the opinion that the money received therefrom should not be paid into the pension fund.

Respectfully submitted,

CLYDE L. DAY,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

December 30, 1908.

In re CHICAGO & SOUTHERN TRACTION COMPANY AND CHICAGO & WESTERN INDIANA CROSSING 81ST STREET.

HON. MILTON J. FOREMAN, Chairman Committee on Local Transportation.

Dear Sir:

We have, at your request, re-examined this matter and submit the following as our opinion as to the rights of these parties:

It appears that the Chicago & Western Indiana Railroad Company obtained authority from the old Town of Lake to construct its track at this point and the track was actually laid in the latter part of the year 1879 when there was no street opened at this point even if one had been dedicated. This territory was annexed to the City in 1889.

In May, 1893, the City passed an ordinance authorizing the Englewood & Chicago Electric Street Railway Company to construct, maintain and operate a street railway upon certain streets, including 81st street. At that time the Western Indiana Company had its tracks across 81st street and was operating them.

The Englewood Company and the Western Indiana Company in June, 1896, entered into an agreement by the terms of which the Englewood Company assumed the burden of constructing and maintaining at its own expense, under the direction and supervision and in a manner meeting the approval of the Western Indiana Company, the crossing at this point.

All the property rights and franchises of the Englewood Company were sold at a foreclosure sale under a decree of the U. S. Circuit Court and became the property of the Chicago Electric Traction Company, and under another foreclosure decree the property rights and franchises of that company were sold and became the property of the Chicago & Southern Traction Company. In the foreclosure suit last mentioned the court entered an order providing that the Chicago & Southern Traction Company should have a certain period of time in which to elect whether it would assume or not assume certain contracts, one of which was the contract with the Western Indiana Company. Within the time limited the Southern Traction Company filed its declaration that it had elected not to assume any of

those contracts, particularly specifying the Western Indiana contract, and now claims that it is not bound by any of the terms or provisions of that contract.

The Western Indiana Company was not a party to the foreclosure suit and had no knowledge or notice of the order last mentioned or of the election made by the Traction Company, but in our judgment that is an immaterial matter.

There can be no disputing the right of the Western Indiana Company to maintain and operate its tracks at this point, neither can we dispute the right of the Traction Company to construct, maintain and operate a crossing at this place. The Western Indiana Company is required by law to make and keep its tracks safe for the carriage of freight and passengers, and is required to ward off every effort that would make the tracks unsafe.

The Traction Company, while it has a right to cross at this point, has no right to do any damage to the Western Indiana Company. If these companies are unable to agree upon the manner in which the crossing shall be constructed and maintained and upon the manner of bearing the expense, then they must appeal to the courts. The city can not at this late date amend either ordinance by requiring either company to bear the expense or by requiring either company to construct or permit the construction of a particular kind of crossing.

We return herewith the statement furnished you by the Traction Company, and also send a letter addressed to us by the President of the Western Indiana Company, having attached to it a copy of the letter from the Traction Company and a copy of the contract between the Western Indiana and the Englewood Company, and a copy of the Traction Company's declaration that it has elected not to assume that contract, and also a photograph showing the condition of things when the Western Indiana had removed from its tracks certain cars obstructing those tracks.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

December 14, 1908.

In re LIABILITY OF ILLINOIS CENTRAL RAILROAD COMPANY TO CONSTRUCT SUBWAY UNDER ITS TRACKS AT 69TH STREET.

HON. B. W. SNOW, Chairman Committee on Compensation.

Dear Sir:

Your request for an opinion as to whether the Illinois Central Railroad Company can be compelled to construct a subway under its tracks at 69th street, has been referred to me.

The "O'Neill Ordinance," passed May 23, 1892, requiring the Illinois Central Railroad Company to raise its roadbed and construct the necessary subways, extended to 67th street. A subsequent ordinance was passed on September 29, 1902, requiring the Illinois Central Railroad Company, together with certain other railroad companies, to elevate the plane of its railway tracks within the City of Chicago.

Paragraph 1 of Section 1 of the ordinance of September 29, 1902, provided that the Illinois Central Railroad Company should commence the elevation of its roadbeds and tracks at a point about on the south line of 67th street and provided the gradient or gradients to be used in the elevation of said tracks until the same should reach a point 50 feet south of the south line of 79th street.

Paragraph 1 of Section 4 of this ordinance provides that certain subways shall be constructed beneath the tracks of the Illinois Central Railroad Company where the tracks are intersected and crossed by certain streets designated therein. No mention is made in the enumeration set forth in this section of the construction of a subway at 69th street, in fact the ordinance is silent as to 69th street.

Section 13 of the ordinance of September 29, 1902, provides in part as follows:

"In consideration of the acceptance of this ordinance by said railway and railroad companies, the City undertakes and agrees that it will not hereafter require or attempt to compel said railway or railroad companies, at their expense, to build any additional or other subways than those in this ordinance

provided for between the following points: 67th street and 79th street on the Illinois Central Railroad," etc.

"An obligation to keep up a crossing, imposed as a condition of the right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road as long as the right is exercised. It is a continuing condition inseparable from the enjoyment of the franchise."

People ex rel. City of Bloomington v. C. & A. R. R. Co., 67 Ill., 118.

"It was not within the power of the city to contract that it would not exercise the authority given it by the statutes, nor to contract that it would not perform the duty imposed upon it by law."

C. B. & Q. v. City of Quincy, 136 Ill., 563.

It will be observed that:

"The legislature intended to provide against any obstruction of the safe and convenient use of the highway, for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway."

C. B. & Q. v. Drainage Commissioners, 200 U. S., 590.

In *Lake Erie & Western Railroad Company v. Cluggush,* 143 Ind., 347, the court said, quoting from *Lake Erie & Western Railroad Company v. Smith,* 61 Fed. Rep., 885:

"The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty, and if by the increase of population or other causes the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public."

So, in *State of Indiana v. Lake Erie & Western Railroad Company,* 83 Fed. Rep., 284-7, which was the case of an overhead crossing lawfully constructed on one of the streets of the city, the court said:

"If by the growth of population or otherwise the crossing has become inadequate to meet the present needs of the public,

it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not necessarily impair the usefulness of the highway."

To the same effect see also:

State ex rel. City of Minneapolis v. St. Paul, Minn. & Manitoba Ry. Co., 98 Minn., 380.

Northern Pacific R. R. Co. v. State of Minn. ex rel. City of Duluth, 208 U. S., 583.

From a careful study of the cases above cited, we are of the opinion that the City can require the Illinois Central Railroad Company to construct a subway at 69th street, notwithstanding the ordinance above cited.

Very truly yours,

FRANKLIN A. DENISON,

Approved: *Assistant Corporation Counsel.*

EMIL C. WETTEN,

First Assistant Corporation Counsel.

MARCH 5, 1909.

In re ORDINANCE SPECIAL ELECTION THIRTY-SECOND WARD.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

In compliance with your verbal request of yesterday as to whether or not you should approve an ordinance providing for an election to fill the unexpired term of office of Alderman of the Thirty-second Ward of the City of Chicago, passed by the City Council at its last regular meeting, I desire to advise you as follows:

The conclusion herein expressed is based upon the following assumption:

First, that there is a vacancy in the office of Alderman of the Thirty-second Ward.

Second, that a law entitled "An Act to provide for the holding of primary elections by political parties," approved February 21, 1908, etc., and hereinafter referred to as the "Primary Act," is constitutional.

Section 61 of the Cities, Villages and Towns Act provides that where there is a failure to elect any officer * * * in all cases when necessary for the purposes of this act the City

Council may forthwith call a special election, and provide *by ordinance* for the mode of conducting the same.

Section 57 of the same act directs that elections shall be held as nearly as may be in the same manner as under the general laws of this State.

It is a rule of law so well settled as not to require the citation of authorities that all ordinances passed by the City Council, whether enacted under specific or general power, must be consistent with the statutes of the State and not in conflict therewith. It is, therefore, necessary to determine whether the submitted ordinance is inconsistent with or repugnant to the State statutes which relate to such matters.

Section 1 of the Primary Act requires that nominations of all candidates for all elective . . . *city officers* by all political parties (as defined by Section 2) shall be made in the manner provided in this act and not otherwise.

Section 4, Clause 9, defines the words "city office" and "village office" or "city officer" and "village officer," an office to be filled or an officer to be voted for by the qualified electors of the entire city or village, as the case may be, including Aldermen.

It is at once clear that the nomination and election of Aldermen is governed and controlled by the provisions of this act.

Section 61 of the Primary Act, which governs the situation before us, recites:

"Whenever a special election shall be necessary, the provisions of this act shall be applicable to the nomination of candidates to be voted for at such special election. The officer or board of commission whose duty it is, under the general election laws of this State, to call an election shall fix a date for the primary for the nomination of candidates to be voted for at such special election. At least fifteen (15) days' notice shall be given of such primary."

The word "board" above used, without doubt, includes a Board of Aldermen of a City Council.

The ordinance herein considered does not comply with this section, inasmuch as it does not fix or pretend to fix a date for the nomination of an Alderman to be voted for at the special

election provided for in the ordinance. In this respect the ordinance conflicts with the statute and is invalid.

The ordinance is also void for the reason that the date therein fixed (April 6, 1909) for the holding of the election is so brief a time that a compliance with the law relating to the fixing of a date for a primary is rendered impossible. In other words, the ordinance could not be legalized by the immediate enactment of another ordinance setting the date for the holding of a primary.

Under the provisions of the general election law a primary could not be held less than thirty-seven days prior to the date set for holding the election, and in determining this period of time but one day has been computed for canvassing the returns and making proclamation.

The only name that could be placed on the ballot to be voted for under the provisions of the submitted ordinance would be that of an independent candidate for Alderman, since all candidates of political parties (the status of which is defined in Section 2 of the act) must be named in accordance with the provisions of the act.

The act, however, contemplates that all legally constituted political parties shall have the right to participate in the election, but the ordinance denies these political parties this privilege. In this respect the ordinance, in that it is discriminative in character, unequal and oppressive in operation, is void.

There are also other defects which might be called to your attention, but believing that the foregoing reasons furnish ample foundation for so doing, I respectfully suggest that the ordinance returned herewith be not approved.

I should be pleased to submit a substitute ordinance for your examination, upon request.

Very respectfully submitted,

HOWARD M. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 11, 1909.

In re APPOINTMENT OF WOMEN AS SPECIAL POLICE OFFICERS.

HON. GEORGE M. SHIPPY, Chief of Police, Chicago.

Dear Sir:

Regarding the question submitted to me as to whether the employment of women as special police officers is legal I take pleasure to advise you that:

"The General Superintendent of Police shall have power, on the application of any person or persons showing the necessity therefor, to appoint and swear in any additional number of special patrolmen to do special duty at any fixed place within the city, at the charge and expense of the person or persons by whom the application is made, and shall keep a correct list of all persons so appointed. He shall issue a special certificate of appointment to each of said special patrolmen and shall, upon receiving a deposit sufficient to cover the cost thereof, provide them with suitable badges which shall be worn by them while on duty, and be returned to said General Superintendent upon the termination of their appointment." Revised Municipal Code of 1905, paragraph 1744.

"Persons so appointed shall conform to and be subject to all rules and regulations governing the police force of the city, and to such special rules and regulations as the General Superintendent may make concerning such police patrolmen. They shall possess all the powers, privileges and duties of the regular police patrolmen, at the places for which they are respectively appointed, and may be removed or discharged from service at any time by the Superintendent, without assigning any cause therefor." Revised Municipal Code of 1905, Section 1745.

In the construction of statutes "words imputing the masculine gender may be applied to females." Illinois Revised Statutes, Chapter 131, Section 1, Subdivision 4.

"The rules for the construction of the ordinances of a municipality are those which are used in the construction and interpretation of statutes enacted by the Legislature." *Illinois Central Railroad v. City of Chicago,* 169 Ill., 329.

Moreover it is provided "that no person shall be precluded or debarred from any occupation, profession or employment (ex-

cept military) on account of sex: Provided, that this act shall not be construed to affect the eligibility of any person to an elective office." Illinois Revised Statutes, Chapter 48, Section 3.

The saving clause embraced by the proviso shows that it was supposed by the General Assembly, in the enactment of this statute, that "occupation" includes the discharge of the duties of a public office. Because the eligibility of women to office generally was presumed to be affected it was necessary, in order to confine the effect of the statute to offices filled by appointment only, to expressly say "This act shall not be construed to affect the eligibility of any person to an elective office," but it may affect, that is to say will affect, those to be filled by appointment, by allowing women as well as men to be appointed. *Schuchardt v. People,* 99 Ill., page 506.

Women have been held to be eligible for appointment to the office of County Superintendent of Public Instruction, Master in Chancery, Attorney-at-law, etc. *Schuchardt v. People,* 99 Ill., 501; *in re Myra Bradwell,* 55 Ill., 535; *Huff v. Cook,* 44 Ia., 639; *Wright v. Noell,* 16 Kans., 601; Opinion of Justices, 62 Me., 596; Opinion of Justices, 107 Mass., 604.

There is not only no express constitutional disqualification of females, and no affirmative statement of qualification which would exclude them, but there is nothing in the statutes or city ordinances, nor in the duties imposed by law upon a police officer which would imply the necessity or intended exclusion of either sex.

I am therefore of opinion that women may be appointed as special police officers of the city.

Respectfully submitted,

ADOLPH TRAUB,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

APRIL 23, 1909.

In re LIABILITY OF PATIENTS DETAINED IN CONTAGIOUS DISEASE HOSPITALS FOR MAINTENANCE, SUPPORT AND MEDICAL SERVICES.

HON. W. A. EVANS, M. D., Commissioner of Health.

Dear Sir:

Your letter of April 14 in which you inquire as to your legal right to collect from patients for services rendered to them in isolation hospitals, has been referred to me, and in reply permit me to say:

The statutes of a number of States provide that where patients are isolated and detained by the health authorities, if pecuniarily able, they shall be liable for nursing, food and medical service. This is true of Maine, Iowa, Michigan, Minnesota, Wisconsin and probably a number of other States. However, there is no such statute in this State. The city has the power to erect and maintain hospitals for the isolation and treatment of contagious diseases under Clauses 77 and 78 of Section 1 of Article 5 of the Cities and Villages Act. *Frazer v. City of Chicago,* 186 Ill., 48. Nothing in the statutes authorizes the city to collect from any patient the expenses of keeping, maintaining and treating him at such hospitals.

The important question then is this: In the absence of such statute, can the city collect from any patient in any such hospital the cost or expense of his maintenance and medical treatment while detained in said hospital?

The cases on the subject are not numerous. In *Town of Farmington v. Jones,* 36 N. H., 271, the minor daughter of the defendant was residing, with his consent, at the house of another, and was there taken with smallpox. The health officers of the town established the house as a pesthouse and detained her with other patients. An action was brought against the father for the support furnished his daughter while thus detained. The court said:

"It does not appear that the support was furnished at the defendant's request, or that he has made any express promise to pay. The plaintiffs must rely upon a promise implied in law, from the facts stated in the report of the auditor."

After stating that the defendant was not guilty of neglect of duty in failing to supply his infant daughter with necessaries, the court said:

"Besides, it cannot be pretended that the authorities of the town, in this case, came to the relief of the defendant's daughter because her father had neglected his parental duty to supply her with necessaries. The law gave them no authority to detain the defendant's daughter in a pesthouse for that purpose. They secluded her and the other inmates of the house from their friends, and supported them there on the public account, and for the public object of preventing the spread of the infectious disease in the town and neighborhood. The pesthouse was not established for the relief of needy persons, nor for those who were sick there with the infectious disease. The supplies were made more necessary by the action of the town, which was taken, not for the benefit of the defendant, or his daughter, but for the general public security against the dissemination of the disease, with which the daughter was accidentally taken while in the town."

In *Labrie v. Manchester,* 59 N. H., 120, the health officers of the defendant city employed the plaintiff to nurse and care for several members of her father's family who were confined with smallpox at the city pesthouse, on the order of those officers. The inmates were confined against their own and their father's consent and were helpless by reason of their confinement. The defendant denied liability. The court said:

"This statute authorized the defendants' health officers to remove to their pesthouse, provided for the purpose, the members of the Labrie family infected with smallpox. The reason of the law, and of the defendants' action under it, was not because the victims of the disease were paupers in need of assistance, nor because the defendants or their health officers owed them the duty of caring for or curing them, but because the public required protection against the spread of an infectious disease. *Farmington v. Jones,* 36 N. H., 271, 272, 273. The authority to provide a suitable house, confine infected persons within it, and make reasonable regulations to prevent communication with the occupants, carried with it the authority to take necessary measures for carrying into effect the regulations estab-

lished by them, and to make the defendants liable for the necessary expense. Having power to compel the confinement of infected persons and prevent their communication with others, and having exercised that power, it became their duty to provide for the wants of those confined there. They could not shut them out from communication with their friends and with the world, and deprive them of any means of obtaining assistance, and at the same time lawfully withhold necessary support and care. They could not establish a hospital without ordinary hospital accommodations, and they could not make the hospital a place of involuntary confinement and escape the duty of supplying the reasonable wants of those who, by confinement and seclusion, were prevented from applying to any one else for relief. They could not furnish relief against the will of those confined, and afterwards recover the expense of them, or of those liable in law to support them. *Farmington v. Jones, supra.* If the health officers were obliged by law to confine persons infected with dangerous diseases, and it was their duty to nurse and support them, and they could not recover the reasonable expense from them or from their guardians, they would be remediless, unless they could charge the expense upon the city. The law does not require the performance of a duty, and at the same time withhold the means reasonably necessary for its performance."

In *Orono v. Peavey*, 66 Me., 60, in discussing the liability of the defendant, under a statute requiring a person infected with a contagious disease and confined by the health officers, to pay for nursing and necessaries, if able financially to do so, the court said:

"Upon these facts can the action be maintained? If it can be it must be by virtue of the statute. There is no liability at common law. There was no express promise to pay. The proceedings on the part of Oldtown were had by virtue of the provisions of the statute to provide for the safety of the inhabitants and prevent the spread of a contagious disease, and not by the request or consent of the defendant. The supplies were furnished while the defendant was removed from his house and under the control of the municipal officers of the town. In such case the law will not imply a promise by the defendant to pay for the supplies furnished."

I have not been able to find any case where the question was directly involved, or where it is necessary to a decision, which holds that, in the absence of a statute authorizing it, a patient removed to and treated at a pesthouse or isolation hospital by the municipal authorities is legally liable for his support and care while confined there.

County of Perry v. City of DuQuoin, 99 Ill., 479, was a case in which the city sought reimbursement from the county for money expended by the city in removing, supporting and caring for persons suffering from smallpox. In holding that the county is legally liable under a statute requiring it to provide any sick person "not having money or property to pay his board, nursing and medical aid," with assistance and care, the court, page 488, said:

"It was, in our opinion, the duty of the county board to furnish them with food, medicines and nursing, and the fact that they were, during the time, restrained within the limits of hospitals or pesthouses, in nowise relieved the board of that duty. *Had these persons been pecuniarily able, the liability for their food, medicine, nursing, etc., manifestly would have been personal;* but not having been pecuniarily able, the liability falls on the county."

The sentence in the above quotation which is italicized is purely dictum, and I do not believe it is authority to the effect that a person who is pecuniarily able is legally liable to pay the expense of maintenance, care and services rendered to him while detained in an isolation hospital under the control of the health officers and in the interest of the public health, in the absence of a statute making him liable for such expenses. If such person is liable it can only be on the theory that there is an implied contract to pay, and under such circumstances I am of the opinion that there is no such implied contract.

I am therefore of the opinion that the part of Section 1032 of the Revised Municipal Code of Chicago of 1905 which empowers the Commissioner of Health to cause patients in isolation hospitals to be provided with suitable nurses and medical attendance at their own expense, if they are able to pay for the same, not being based upon any statutory grant of power to the City, is invalid.

I am also of the opinion that even if a person goes willingly, upon the request of the health authorities, to the hospital, he is not liable for his expenses while there, but if he requests to be taken there for treatment or is informed that he will be charged for his expenses while there, and consents by word or conduct, he, of course, is liable.

In answer to your question whether there is any means of prosecuting an unvaccinated man who becomes infected with smallpox and who thus endangers the life of the community, I am of the opinion that no such prosecution can be sustained, in the absence of a statute requiring vaccination, and in addition thereto, authorizing such prosecution.

Very respectfully yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

ROBERT N. HOLT,
Asst. Corporation Counsel.

JUNE 4, 1909.

In re PROPOSALS FOR GASOLINE STREET LIGHTING.

HON. B. W. SNOW, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of the letter dated June 1st from the secretary of your committee enclosing proposals of three companies for gasoline street lighting in Chicago, beginning September 1, 1909, and letter concerning the same from the City Electrician. In reply to the inquiry whether the lowest bid, namely, that of the American Street Lighting Company, can be considered as regular and in accordance with specifications and advertisement, we beg to say:

The proposal of this company is submitted subject to three conditions: First, that if necessary a period of six months be allowed from the award of the contract in which to erect the necessary equipment; second, that the City will furnish free of any cost or rental, locations for the erection of tanks for the storage of gasoline; third, that the City will pay interest at the rate of 6 per cent upon all bills that are not paid within a period of 30 days after presentation.

It is apparent that the acceptance of this proposal and the execution of a contract on the terms submitted would create an obligation substantially different from that contemplated by the advertisement and specifications. In the first place, an allowance of six months to the contractor in which to erect his equipment would postpone the commencement of the service called for until long after September 1, 1909, from which date service is called for by the advertisement and specifications. Secondly, while the specifications are silent as to furnishing locations for gasoline tanks, it is provided on page 2 thereof that the contractor shall erect the necessary posts, furnish all other appliances and maintain the same, the natural inference from which would be that the contractor is to provide storage for gasoline, if required, at his own expense. Thirdly, the provision that the city must pay interest at 6 per cent upon all bills not paid within 30 days after presentation would relieve this bidder, if his proposal were accepted, of a possible financial burden which, so far as we are aware, is assumed by all contractors dealing with the city, including the other bidders on this contract. In the light of past experience it is evident that a contractor receiving 6 per cent interest on payments delayed more than 30 days after due has a most substantial advantage over those who do not enjoy this privilege.

We are, therefore, of the opinion that the bid of the American Street Lighting Company is not only irregular and inconsistent with the specifications and advertisement, but that the company are not entitled to be considered in the competition for this work for the reason that their bid is not responsive to the advertisement and is based upon terms and conditions substantially different from those offered by the City.

Where any law or ordinance requires a public contract to be let on advertisement to the lowest responsible bidder, it is well settled that officials are without authority to award a contract different in terms from that contemplated by the advertisement and that such an award will create no valid obligation. In *Wickwire v. City of Elkhart,* 144 Ind., 305, it is said, page 309:

"It is difficult to see how the contract could be made upon a basis entirely different from that contemplated by the speci-

fications and the form of bid supplied. It is, it seems to us, perfectly clear that all competitors were entitled to place their bids upon the basis upon which the contract was to be awarded, and that to require bids upon one basis and award the contract upon another was, in practical effect, but to abandon all bids."

In *Nash v. City of St. Paul,* 11 Minn., 174, it was said, page 178:

"No bids were asked for such a contract as the one made with the plaintiff, and the contract let, not being the same that was advertised, the acts of the city or ward officers in making it were void and created no liability on the part of the defendant."

So also in *People v. Van Nort,* 65 Barbour (N. Y.), 331, the court said, page 333:

"It was irregular in the Croton board, under the circumstances, to award a contract which had been made upon proposals to do the work in a different way from that which was contemplated when the notice was published for receiving such proposals. They had no right to make such award and if it had been done, no assessment made under it would have been valid."

These principles are also sustained by the following:

Matter of Marsh, 83 N. Y., 431; 20 Am. & Eng. Encyc., 1169, and cases cited.

Should your committee decide that the best interests of the City require the acceptance of the proposal of the American Street Lighting Company, the City Electrician should be instructed to reject all bids and the City Council should be asked to authorize the award of a contract to this company upon the conditions which it has submitted. If it is desired to let this contract after an open competition between bidders for the work, we believe that either the bid of the American Street Lighting Company must be disregarded or that the City Electrician must re-advertise for new bids.

Yours respectfully,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Concurred in by
WILLIAM D. BARGE.

JUNE 28, 1909.

In re SALE OF LIQUORS IN ORIGINAL PACKAGES.

E. J. MAGERSTADT, ESQ., City Collector.

Dear Sir:

Replying to your favor of recent date, with letter of Wakem & McLaughlin attached, requesting an opinion as to whether or not the operation of a business outlined in their communication requires them to take out wholesale liquor dealer's license, will say:

It is stated in their communication that they are in the business of warehousemen, bankers and distributers; that they make a specialty of distributing staple imported wines and liquors in original packages to wholesale dealers in Chicago and throughout the country; that the goods are billed to the purchasers on their own billheads; that the amount charged and collected for the same is made up of the foreign cost of the goods, the duty and freight added, and a nominal amount for their services; that they also represent foreign shippers who employ their own salesmen, and they deliver and collect for the account of such shippers as their bankers.

The foregoing statement involves several questions, viz.:

(1) Is this firm engaged in the business of selling wines and liquors in original packages?

(2) Are persons selling wines and liquors in original packages exempt from the operation of the city ordinances regulating the sale of such liquors?

(3) Are the persons for whom this firm is acting as distributers and bankers in this city subject to the ordinances thereof?

The liquor traffic is regulated by ordinances which are divided into five articles: Article 1 relates to dram-shops; Article 2, to brewers and distillers; Article 3, to wholesale malt liquor dealers; Article 4, to wholesale spirituous liquor dealers, and Article 5, to wholesale vinous liquor dealers.

The question submitted for an opinion involves Articles 3, 4 and 5, which include Sections 1359 to 1378, inclusive, of the Municipal Code of Chicago of 1905, wherein it is provided:

"No person or corporation shall, within the city, sell or

offer for sale any (section 1759) malt liquor (section 1367) spirituous liquor, (section 1373) vinous liquor in quantities of one gallon or more at a time without first having obtained, as hereinafter provided, a license so to do for each place of business where . . . liquor is sold or offered for sale."

The ordinances provide for the filing of an application and bond, the fee to be paid for each license (a separate license being required under each article), the location and notice of change of location, the manner of marking vehicles, and the penalty.

In determining whether this company is a dealer in and sells or offers for sale such liquors, within the meaning of the ordinance, we must look to the manner in which their business is carried on.

It appears in their communication that the liquors are carried in their warehouse in Chicago, are sold by them and billed on their own billheads at a price including their profit. There is no doubt that this constitutes a sale by this firm and gives them the right of action in their own name for the recovery of the amount of such sale. The fact that such sale and distribution is of original packages does not exempt them from the operation of the ordinance above quoted.

On August 8, 1890, there was enacted by Congress a bill known as the Wilson Bill, which provides that:

"All fermented, distilled or other intoxicating liquid or liquors transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The Supreme Court of the United States held that the above enactment was a valid exercise of the legislative power conferred upon Congress; and after the Act took effect such liquids or liquors introduced into any State or territory from another State, whether original packages or otherwise, became

subject to the operation of such of its then existing laws as had been properly enacted in the exercise of its police power.

In re Rahrer, 140 U. S., 545.

State of Iowa v. Rose, 170 U. S., 412.

Pabst Brg. Co. v. Crenshaw, 198 U. S., 17, p. 25.

It is also stated in their communication that they represent certain foreign shippers, such as Moses Risk & Son, who employ their own salesmen, and that they (Wakem & McLaughlin) make the deliveries and collect for the account of the foreign shippers as their bankers.

If a foreign shipper of liquors carries stock in the city in a store or warehouse, employs his own salesmen and delivers such stock from such store or warehouse in the city, bills the goods in his own name, he is also a dealer in such articles and sells and offers to sell the same in the city, within the meaning of the ordinance.

I am, therefore, of the opinion, first, that Wakem & McLaughlin and all others engaged in carrying on the liquor business, as indicated, are subject to the provisions of the ordinances regulating the liquor traffic and are required to have a license to conduct such business. Second, that persons selling wines and liquors in original packages are not exempt from the operation of the liquor ordinances and the payment of the license fees therein provided. Third, that foreign shippers carrying a stock of liquors in the city, employing their own salesmen, and having the goods delivered by their warehousemen and the account and bill collected by their banker, are also amenable to the ordinances regulating the liquor traffic and require a license to carry on such business within the city.

Respectfully submitted,

JOHN J. BEILMAN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

NOVEMBER 1, 1909.

In re LIABILITY OF A. T. & S. F. AND I. C. R. R. COMPANIES TO RECONSTRUCT SUBWAY AT WESTERN AVENUE IN ORDER TO FURNISH ADDITIONAL HEADROOM.

H. H. EVANS, ESQ., Secretary, Committee on Local Transportation.

Dear Sir:

Replying to your communication of October 29th, concerning the liability of the Atchison, Topeka & Santa Fe and the Illinois Central Railroad Companies to reconstruct subway beneath their tracks at Western avenue in order to furnish additional headroom therein for the purpose of enabling the street car company to operate in said subway the larger type of cars which it is installing, I beg to advise you that it was held in *Doane v. Lake Street Elevated R. R. Company,* 165 Ill., 510, that the use of a street for street railway purposes was a public, as distinguished from private, use of the street.

The Supreme Court of the United States held in *C., B. & Q. Ry. Co. v. People,* 200 U. S., 561, that a railroad company might be compelled at its own expense to construct a new and larger bridge over a natural water course which construction was rendered necessary in order to afford increased facilities for carrying water in that water course when the necessity therefor was made necessary by the Commissioners of the Drainage District of the drainage of a large body of land contiguous to such natural water course.

That a municipal corporation has plenary power to control the use of its streets is a proposition that does not admit of doubt.

If the increased headroom in question were a benefit accruing to the public, there would not be much doubt but that *C., B. & Q. v. People, supra,* would be ample authority on which to base a requirement that the railroad company reconstruct the subway in question at its own expense. But it may be contended, and not altogether without merit, that the use of the larger type of car is a benefit to the street railway corporation as such, although at the same time it increases the comfort and convenience of the public occupying its cars.

I am, therefore, of the opinion that the railroad companies and street railway company may be required to reconstruct the subway in question and that each may be required to bear its equitable proportion of the cost of so doing.

Yours very truly,

CHAS. M. HAFT,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

FEBRUARY 15, 1910.

In re LOTTERIES.

HON. LEROY T. STEWARD, General Superintendent of Police.

Dear Sir:

You recently requested an opinion whether the manner of conducting business as stated in the questions following is in violation of law:

(1) Whether conducting sales of personal property, principally jewelry and novelties, by putting up articles of different kinds and values in boxes or packages the contents of which are concealed from the proposed purchasers and placing a large number of such packages in a box, basket or other place and offering a choice of them at a certain price per box, is unlawful?

(2) Whether a person carrying on the business of cleaner and dyer issuing tickets entitling persons placing work or orders with him for the sum of $1 or more to a chance to secure an automobile stated to be worth $1,100, without additional cost (it does not appear when or in what manner the drawing is to be made), is acting in an unlawful manner?

(3) Whether sales of merchandise or novelties with which the purchaser is entitled to a chance to secure another article as a prize is unlawful?

(4) Whether sales of gum or candy by a vending machine which contains some packages of greater value than others and are sold at the same price is unlawful?

Section 180 of Chapter 38, Revised Statutes of Illinois (Criminal Code) provides as follows:

"SETTING UP OF.] Whoever sets up or promotes any

lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding $2,000."

Sections 913 to 915 of the Revised Municipal Code of 1905, as amended, provide, among other things, as follows:

(Paragraph 6, Section 1.) "No person shall, either publicly or privately, as owner or agent, establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of, any lottery, policy or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known, whether located or to be drawn, paid or carried on within or without the limits of the city, and whether such drawings be real or imaginary, and no person shall be in any way concerned in any such lottery, policy or scheme of chance as aforesaid."

The manner of disposing of property involved in your first query seems to be new and I find from an exhaustive and careful research of the authorities that a case directly in point has not been passed upon by courts of last resort. We will, therefore, look to the authorities to find the construction placed upon statutes and ordinances like or similar to our own.

It will be noted that the statute above quoted provides "whoever . . . by way of lottery, disposes of any property of value . . . shall be fined," etc.

The Supreme Court of Illinois has accepted the definition of the lexicographers that a lottery is a scheme for the distribution of prizes by chance.

Dunn v. People, 40 Ill., 465.
Thomas v. People, 59 Ill., 160.
Elder v. Chapman, 176 Ill., 150.

We must then determine whether the element of chance is connected with sales made as indicated in your query and in so doing we look at the advertisements and inducements held out to the public to make the purchases. I am informed that in some instances display advertisements state that the articles are unredeemed Christmas presents, uncalled for goods, and that the packages contain articles worth up to $2. Taking these advertisements in connection with the fact that the contents are concealed, can we then say that it is a scheme disposing of property by way of lottery?

In the case of *Dunn v. People, supra,* the defendant conducted what was termed a "gift sale." He sold envelopes containing recipes and popular songs. Each envelope contained a card representing an article of merchandise, which article the holder could purchase for the sum of $1, regardless of the value. The cards represented articles of different values, among which were pianos, watches, jewelry, books, etc. It was contended that the sale of the songs and cards was not the sale of a lottery ticket; that the card representing an article of merchandise conferred simply a right to buy, which the holder could exercise or not, at his option, and if he bought, he did so with his eyes open and with the opportunity of knowing the value of what he purchased. The court said:

"This is true, but the element of chance lies, not in what the holders of the envelopes may knowingly do with his card and dollar after he purchased his envelope, but in the purchase of the envelope itself, which it is represented to him by the advertisements may contain a card or ticket that will give him the right to buy for one dollar an article worth hundreds of dollars, or may contain a card that will only give him the right to buy something so valueless as not to be worth buying at any price. He may choose to call his business a 'gift sale,' but it is none the less a lottery and we cannot permit him to evade the penalties of the law by so transparent a device as a mere change of name. If it differs from ordinary lotteries, the difference lies chiefly in the fact that it is more artfully contrived to impose

upon the ignorant and credulous and is, therefore, more thoroughly dishonest and injurious to society."

The Supreme Court of New York says:

"The word 'lottery' has no technical meaning. A lottery is nothing more or less than a scheme or device of chance."

People v. Noelke, 94 N. Y., 137.

The Supreme Court of Michigan defines a lottery as a scheme by which a result is reached by some action or means taken in which man's choice or will has no part and which human reason, foresight, sagacity or design cannot enable him to know or determine until the same has been accomplished.

People v. Elliott, 2 L. R. A., 403.

In *Fleming v. Bills,* 3 Ore., 286, it is said that a scheme for the distribution of prizes by chance may provide for distributing them all at one time, or at several times, absolutely to one set of persons or conditionally to that set or class. It may allow one person to exhaust all his chances before other persons accept a chance, and still the scheme is within that definition.

In *Holoman v. State,* 2 Tex. Cr. App., the defendant was charged, under a statute similar to our own, with disposing of personal property by lottery. He sold boxes of candy at 50 cents per box and represented that each box contained a prize of some sort—some money, some jewelry. The party purchasing the candy would point out the box which he wanted and upon payment of 50 cents it would be handed to him. In sustaining a conviction the court said:

"The manner of disposing of the boxes of candy with a chance to get $10 or some less prize, as the evidence shows was done in this instance, is but an attempted evasion involving the lottery principle. The subterfuge resorted to by the plan of operations cannot avail the accused as a defense to the prosecution."

Schemes of the same nature as that mentioned in your first query were carried on for the purpose of selling real estate.

In *Elder v. Chapman,* 176 Ill., 142, p. 150, the court says:

"Where a scheme provides for the sale of a tract of land in lots of unequal value to be distributed among purchasers by chance by means of tickets of numbers bought at a fixed price

greatly exceeding the value of the majority of the lots and much less than the value of other lots, such scheme would constitute a lottery, as it would be a mere device to attract adventurers, holding out the hope of great gain by mere chance."

To the same effect see:

Guenther v. Dewien, 11 Ia., 133.

Wooden v. Shotwell, 23 N. J. Law, 465.

And in *Paulk v. Jasper Land A.,* 116 Ala., 178, the court said:

"Where by contract parties bought lots of different values, each paying $100, and the lot each party was to receive was determined by drawing from a box a card with the description of the lot on it, there can be no doubt that the scheme is a lottery."

I believe from the facts submitted to me with your first query that that manner of disposing of personal property constitutes a lottery and is in violation of the statute and ordinance, and that the foregoing authorities, as well as others, based upon the same theory, will support that contention.

Your second and third queries involve the same principles of law and have been passed upon by courts of last resort in almost every State. It appears from the facts submitted to me with your second query that Shampay Brothers are carrying on the business of cleaner and dyer and have several stores or places of business in the city; that their principal place of business is located at 35th street and Grand boulevard. This firm is publishing and distributing advertisements in the form of cards, circulars and signs which read as follows:

"AN AUTOMOBILE FREE!

It is not often that you have an opportunity to secure an article worth $1,100 for nothing, but in this instance it is true. With each order you send us for cleaning amounting to $1.00 or more, we will mail you a ticket on a FULLY EQUIPPED NEW 1910 BUICK RUNABOUT, which you may own

ABSOLUTELY WITHOUT COST.

Instead of increasing our prices to meet this added expense, we

have, in many instances, reduced them. Our well known reputation for superior work is the reference we offer you.

Call Douglas 87 for prompt and efficient service.

Yours respectfully,

SHAMPAY BROS., GENERAL CLEANERS.

The Runabout is on exhibition at our main office, 35th and Grand Boulevard."

The ticket mentioned in the advertisement and given or mailed to the customer represents a chance upon the automobile. However, neither the ticket nor the advertisement indicate the time or manner in which the drawing is to take place or how it will be determined who is to receive the automobile. However, each ticket represents a chance as indicated by the advertisement, viz., with each order you send us for cleaning amounting to $1 or more, we will mail you a ticket on a fully equipped new 1910 Buick Runabout, which you may own without cost. The plan here adopted is usually termed a "gift sale" and as such has been condemned by courts of last resort.

It may be contended that the manner of distributing the prize or the time or place is not fixed and, therefore, it does not come within the prohibition of the statute. This question was passed on by our Supreme Court in the case of *Thomas v. People,* 59 Ill., 160. The court said:

"The fact that no plan of distribution had been determined upon at the time of the sale of the ticket would not relieve the scheme of its character as a lottery when it was apparent that some of the purchasers of tickets would fail to receive a prize. The distribution could not be in a just and legal manner unless the number of purchasers was the same as the number of prizes and the prize received proportional as nearly as possible to the amount of money paid."

In the above case Thomas & Co. were general agents for the Chicago Industrial College & Home Festival, who conducted a series of concerts and lectures. The admission fee was $5 and entitled the holder of a ticket of admission to a steel engraving and a chance to obtain an additional prize, and the court say:

"Even if the ticket to the concert and lectures and engrav-

ing were intrinsically worth the price paid for the ticket the scheme would still be a lottery."

In the case of *Davenport v. City of Ottawa,* 54 Kas., 711, a merchant carrying on a general mercantile business exhibited in his window a box containing $25, and advertised that with each purchase of goods of the value of 50 cents or more a key would be given and that the purchaser holding the key that would unlock the box would be entitled to the contents. A ticket containing the offer was attached to each key. All goods were sold at regular prices and no other consideration was required of the purchaser. In sustaining a conviction the court held that the scheme was a lottery.

In the case of *People ex rel. v. Lavin,* 66 L. R. A., 601 (N. Y.), the relator, charged with maintaining a lottery, was engaged in the manufacture of cigars under the brand "Floradora" as a means of advertising his cigars and increasing the sales thereof, devised a scheme for the distribution of prizes based upon an estimate as shown in the following advertisement:

The United States Tobacco Journal.
Save Cigar Bands.
Another Free Distribution of
$142,500.00
Will be made in December, 1903,
Based on the Month of November, 1903,
To Smokers of
(Here follow the names of thirty brands of cigars.)

How many cigars (of all brands, no matter by whom manufactured) will the United States collect taxes on during the month of November, 1903?

(Cigars bearing $3.00 tax per thousand.)

The persons who estimate nearest to the number of cigars on which $3.00 tax per thousand is paid during the month of November, 1903, as shown by the total sales of stamps made by the United States Internal Revenue Department during November, 1903, will be awarded as follows:

. . . . . .

Every 100 Bands from the above-named Cigars will Entitle you to Four Estimates.

(One band from 'Floradora' Cigars or one band from 'Floradora Operas' counting as two bands from the other cigars mentioned; and no less than 100 bands will be received at any one time for estimates.)"

In passing on this matter the court says (p. 606):

"We think the distribution in this case is controlled by chance within the meaning of the statute, and that, therefore, it is illegal. The scheme certainly falls within the requisites of a lottery as defined by the Supreme Court of the United States in *The Public Clearing House case* (194 U. S., 497), under a statute similar to our own (Illinois)."

From the facts submitted with your second query I am of the opinion that the inducement held out to customers to procure the automobile, together with the advertisement and tickets representing the chance, constitute a lottery, and is in violation of the statute and ordinance.

Your third query presents the question whether the sale of merchandise with which a card is given upon which numbers are printed giving the purchaser the right to sign his name beside a certain number on the card, and when all the numbers are taken to have a drawing by removing a cover or paster under which is a number corresponding with one of the numbers on the card which entitled the person whose name appears at the number corresponding with the concealed number to a prize. This is clearly a lottery and falls further within the prohibition than the cases cited in your first and second queries. The authorities above cited are applicable to this form of lottery and the conducting of a business in this manner is in violation of the statute and ordinance, regardless of the fact that same are called "gift sales," "premium sales" or "prize sales."

Commonwealth v. Thatcher, 97 Mass., 583.

Commonwealth v. Emerson, 165 Mass., 146.

State v. Clarke, 33 N. H., 329.

State v. Short, 32 N. J. Law, 398, and cases above cited.

Your last query involves the sale of gum in what is called a penny vending machine. It is represented that among the penny packages are inserted at certain intervals packages wrapped in green paper that contain a certificate or coupon entitling the holder to a 5-cent package of gum. The sales are made by drop-

ping a penny in the slot and the purchaser sees just what packages he will receive for the penny and where the green package containing the coupon is situated with reference to the other packages. From my investigation I failed to find any authority passing directly upon the facts in the question submitted. It appears to me that the necessary element of chance is here wanting to bring this within the definition of a lottery.

I am, therefore, of the opinion that the manner of conducting sales by this machine is not in violation of the statute or ordinance.

In conclusion will say that I am of the opinion that the methods of conducting business as set forth in your first, second and third questions are in violation of the statute and the ordinances above quoted and are lotteries as defined by the Supreme Court of Illinois and other States and have all the dominant features necessary to constitute such business a lottery.

I am also of the opinion that the manner of making sales by a penny vending machine as above stated and involved in question 4 is not a lottery, nor is it a violation of the statute or ordinances.

My answer to the last question should not be construed to apply to any of the vending machines where an opportunity is held out to the purchaser to procure additional property or value where there is an element of chance.

Yours very truly,

JOHN J. BEILMAN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

JANUARY 22, 1909.

In re LICENSE REQUIRED TO SELL LIQUOR FROM WAGON IN OLD VILLAGE OF HYDE PARK.

HON. E. J. MAGERSTADT, City Collector.

Dear Sir:

I beg to acknowledge receipt of your favor of January 18, 1909, requesting this department to give you an opinion on the following questions, viz.:

(a) What license is required by a person engaging in the business of soliciting orders for the sale of spirituous liquors in quantities of one gallon or more within the boundaries of the Village of Hyde Park, and delivering the goods on receipt of the orders by the person or his agent?

(b) What license is required by a person soliciting orders for spirituous liquors in quantities of one gallon or more in the old Village of Hyde Park for a wholesale liquor house located in Chicago and outside of the old Village of Hyde Park, said liquor house having a wholesale spirituous liquor license issued by the City of Chicago, the person (solicitor) receiving a commission from the wholesale house for the sale so made, and the goods to be delivered by the person in a wagon owned and controlled by him?

(c) The question involves the two above substituting the words "less than one gallon" for "one gallon or more."

The foregoing questions involve the ordinances of the old Village of Hyde Park prohibiting and regulating the liquor traffic in that village in force prior to the annexation of the village to the City of Chicago. Prior to such annexation there was in full force and effect in said village the following ordinance:

"Section 5. No person shall by himself or another, either as principal, agent, clerk, servant, or employe, directly or indirectly, sell or give away or deliver, any spirituous, vinous, or malt liquor, in any less quantity than four gallons in any one package, to any one, at any place other than a regularly licensed saloon or dramshop, or from or with any liquor, beer or express wagon, or employ, control, manage or use any conveyance for such purpose except as hereinafter provided; and hereafter no license shall be granted to keep, use or maintain any liquor or beer wagon within the village of Hyde Park, except as herein provided. Delivery wagons may be licensed to deliver beer or other liquors in quantities of not less than one gallon in one package to one person, and for no other purpose, upon application and the payment of a sum at the rate of five hundred dollars per annum for each delivery wagon, payable in three equal installments, on the first day of April, August and December of each year, and no wagon without such license shall be used for

the purpose of delivering any spirituous, vinous or malt liquor at any place other than at a regularly licensed saloon or dramshop.

Any person violating any provision of this section shall, upon conviction, be fined not less than twenty dollars nor more than two hundred dollars for each offense."

The question of whether or not this section (5) continued in force after the annexation of Hyde Park to Chicago, as well as its validity, was raised in the case of *People ex rel Krause v. Harrison,* 191 Ill., 257. The relator sought to coerce the Mayor by mandamus proceedings to grant him a license to carry on the business of a wholesale malt liquor dealer in the Village of Hyde Park under an ordinance of the City of Chicago. It was there contended by the relator that at the time of the annexation of Hyde Park to the City of Chicago, June 29, 1889, the territory comprising the Village of Hyde Park became subject to all existing and future ordinances of the City of Chicago, save only as the Hyde Park ordinance with reference to dramshops was continued in force by operation of the Annexation Act. In denying the relief prayed for and in sustaining this ordinance, the court said, page 267:

"There cannot in our opinion be any doubt it was the intention of the Legislature, and of the lawfully constituted authorities of Hyde Park as well, that there should be preserved to the annexed territory all of the Hyde Park liquor ordinances in force at the time of annexation for all time to come, except as they provide for a change therein, and that they were placed beyond repeal by the City of Chicago." *People v. Cregier,* 138 Ill., 461; *Swift v. Klein,* 163 *id.,* 269; *People v. Harrison,* 185 *id.,* 307.

It was also contended by the relator in that case that this section was invalid because it arbitrarily and unreasonably discriminates both as to persons and places; that no provision is made one way or the other for a wholesaler; that a wholesaler cannot procure a license to sell in any quantity, while a dramshop or saloonkeeper having a license to retail in less quantities than one gallon may sell in any quantity, as may also delivery wagons licensed to deliver beer or other liquors.

Ordinances very similar, if not identical, with the one in question, have been held invalid by our Supreme Court in the case of *City of Cairo v. Fauchter,* 159 Ill., 155, and *Monmouth v. Popel,* 183 Ill., 634. The Supreme Court, however, in that case disposed of the question of its validity by saying:

"The argument that the amendatory ordinance of Hyde Park, passed June 24th, 1889 (Section 5), is void because of making unjust discriminations between persons who may sell liquor in less quantities than four gallons in a package, does not seem to us to require particular attention. It deprives the relator of nothing he asks for that he has an inherent right to."

Inasmuch as this ordinance was held valid by the Supreme Court, it is incumbent upon the City to keep it in full force and effect in the Village of Hyde Park and to require the fee provided for in the section in question of persons desiring a license for such delivery wagons, that is to say, delivery wagons may be licensed to deliver beer or other liquors in quantities of not less than one gallon in one package to one person upon application and the payment of $500 per annum for each delivery wagon.

I assume from your first question that a person soliciting orders for liquors carries his stock of goods in a wagon in going from house to house or over a certain route where he has his customers, and delivers his goods (liquors) from the stock carried in the wagon. If this is true he clearly comes within the provisions of this section and is required to have the license therein fixed at $500 per annum.

The second question seems more complex than the first, although it involves the same principle. The solicitor taking orders in Hyde Park for a wholesale house situated in the City of Chicago outside of the old Village of Hyde Park, receives a commission on the goods sold and delivers the same in a wagon owned and controlled by him. If the solicitor carries on the business in the same manner assumed in your first question, it is wholly immaterial whether he is an agent of a wholesale house outside the old Village of Hyde Park or whether he receives a salary or commission upon his sales, nor does it matter to whom the wagon belongs. In any event, it would be a sale and delivery in Hyde Park and the person would be subject to the require-

ments of this ordinance, and the payment of a license fee of $500 as there provided.

It will be noted that the ordinance prohibits the sale or delivery directly or indirectly and applies alike to the agent, clerk, servant or employe as well as the principal.

Answering your third inquiry, substituting "less than one gallon" for the words "one gallon or more," will say it is not lawful for any person to conduct this business in that manner. Sales of liquor in quantities of less than one gallon can only be made by persons having a license to conduct a dramshop. A dramshop has been defined by the statute (Sec. 1, Chapter 43, Revised Statutes, page 838) as "a place where spirituous, vinous or malt liquors are sold in quantities of less than one gallon." A "place" does not mean a wagon driven from house to house or from one part of the city to another. The same definition is given a dramshop by the city ordinance, as well as the Hyde Park ordinance. Section 4 of the Dramshop Act provides: "The license shall state . . . the place where the dramshop is to be kept and shall not be transferable, nor shall the person licensed keep a dramshop at more than one place at the same time." The word "place" used in the statute and ordinance relating to dramshops means a permanent location where the business is to be conducted.

It is also provided by Section 14 of the Hyde Park ordinance that:

"No person shall hereafter, by himself, his agent or servant, solicit, ask or take any order from any person or persons within said village for the sale or delivery of any spirituous or vinous or malt liquors, in quantities less than one gallon, at any other place than that named in such person's license, or sell, offer for sale or deliver any such spirituous or vinous or malt liquors at any other place than that named in his license, within the Village of Hyde Park, under a penalty of not less than fifteen dollars nor more than two hundred dollars for each offense."

In view of the ordinances of the Village of Hyde Park and the construction placed upon them by the Supreme Court, I am of the opinion that a license fee of $500 will be required to carry on the business in the old village of Hyde Park mentioned in

questions (a) and (b), and that the business mentioned in question (c) cannot lawfully be carried on in the City of Chicago or in the old Village of Hyde Park.

Yours truly,

JOHN J. BEILMAN,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JUNE 2, 1909.

In re CLAIMS AGAINST CITY FOR WRECKING DANGEROUS BUILDINGS—RIGHT OF REIMBURSEMENT FROM OWNER.

HON. BERNARD M. SNOW, Chairman, Committee on Finance.

Dear Sir:

Your letter of the 20th ult. to Edward J. Brundage, Corporation Counsel, requesting an opinion as to what disposition should be made of claims for the wrecking of dangerous buildings in accordance with Section 205 of the Revised Code, also asking whether the expense of wrecking dangerous buildings can be charged to the owners of said buildings, has been referred to me for answer, and in reply I beg leave to state that the authority of the City Council to pass and enforce the provisions of Section 205 is granted it, if at all, under the Cities, Villages and Towns Act, Chapter 24, in the following clauses:

"Seventy-fifth. To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

"Sixty-sixth. To regulate the police of the city or village and pass and enforce all necessary police ordinances.

"Sixty-first. To prescribe the thickness, strength and manner of constructing stone, brick and other buildings, and the construction of fire escapes thereon.

"Sixty-second. The City Council and the president and trustees in villages, for the purpose of guarding against the calamities of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected or placed, or repaired, without permission and to direct that any and all buildings,

within the fire limits, when the same shall have been damaged by fire, decay or otherwise, to the extent of fifty per cent of the value, shall be torn down or removed, and to prescribe the manner of ascertaining such damage."

The power "to declare what shall be a nuisance and to abate the same . . . carries with it the right to pass ordinances necessary to carry out the grant of power." "Where a statute is obviously intended to provide for the safety of a community, and the ordinance under it is reasonable, and in compliance with its purpose, both the statute and the ordinance are lawful and must be sustained."

City of Rochester v. West, 164 N. Y., 510.

"The power of the city to regulate the removal or construction of wooden buildings anywhere within the corporate limits of the city, even though not within the fire limits, is implied as an incident to the power to declare what shall be considered nuisances and to abate and remove the same."

Patterson v. Johnson, 214 Ill., 481, 490.

To the same effect:

King v. Davenport, 98 Ill., 305, 310.

There is no question of the city's right to pass ordinances authorizing the summary abatement of nuisances, such as a dangerous wall of a building, and the destruction of a wooden building where it is damaged more than 50 per cent of its original value by fire, decay or otherwise, but the question remains, whether or not as an incident to this right of the City to abate a nuisance it has a right to charge the owner, occupant or person in possession, charge or control of the building, with the expense of such abatement and to collect by appropriate legal proceedings.

On this question our Supreme Court in the case of *County of Perry v. City of DuQuoin,* 99 Ill., page 479, held that the inmates of an isolation hospital are liable for the expense of their maintenance while thus detained.

The question of the right of the City to recover the expense in abating a nuisance was decided adversely to the City in the case of the *Village of Palmyra v. Warren,* 114 Ill. App., 562. There was no ordinance or resolution having the effect of law in the Village of Palmyra requiring the owner to pay for the abatement of the nuisance. The court, after quoting the charter

powers given to the City and distinguishing between the case of *Train v. Boston Disinfecting Co.*, 144 Mass., 523, said:

"The foregoing constitute the only powers conferred by statute upon municipalities relating to the subject of nuisances. It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation, to impose upon any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. It follows that there was no legal obligation upon appellees to pay the expense of abating the nuisance in question, and therefore no promise to pay the same could be implied. . . . The liens upheld in *Train v. Boston Dis. Co.* and *City of Buffalo v. Yattan, Sheldon, N. Y.*, were in no sense equitable liens upon personal property. They were purely common law liens arising from a legal obligation imposed by statute, and of which possession was essentially the foundation."

After a careful consideration of these and other authorities, I am of the opinion that the Legislature may lawfully enact a law providing that the expense of abating a nuisance may be charged to the owner of the property or the occupant of the premises, or that they may delegate that power to the City Council in cities and the Board of Trustees in towns and villages, and that under that grant of power cities, towns and villages or either of them may pass ordinances or regulations requiring the owner or occupant of the premises upon which a nuisance exists to abate the same, and that upon his failure to do so they may summarily abate the same and charge the expense of the abatement to the owner or occupant; but the Legislature not having passed such a law and not having by direct legislative grant, granted the right to the cities, towns and villages to pass ordinances which would have the effect of law providing for the recovery of moneys expended by the City in the abatement of nuisances, I am not ready to say that they have this right. Our Supreme Court has, however, in the case of *Patterson v. Johnson*, enlarged upon the charter powers granted the City on the question of regulating the construction or removal of wooden buildings within the fire limits, and has upheld the City's police power to regulate the construction or removal of wooden buildings anywhere within the corporate limits.

Whether our Supreme Court would, under the power to declare what is a nuisance and abate the same, uphold the provisions of an ordinance charging the expense of abating the nuisance to the owner, as provided in Section 205 of the Revised Municipal Code of Chicago of 1905, is a question very difficult to determine, but until a final decision is rendered in some test case I am of the opinion that the City should assume this right.

In your letter you ask, "If the language of Section 205 of the Municipal Code is not such as to make it possible to collect these amounts paid out by the City, is there not some amendment that could be drafted so as to make certain reimbursement?" and in reply to this inquiry I beg leave to suggest that said Section 205 be amended by striking out the provision in said section that "It shall be the duty of the Commissioner to proceed forthwith to do or cause to be done any and all work necessary to place such building or structure, or part thereof, in a safe condition," and I transmit herewith a copy of a draft of an amendment tentatively adopted by the sub-committee on general provisions now engaged in the revision of the building ordinances, which will in a measure remedy the defects in said section. Where the owner of a building or property suffers it to become in such a dangerous condition that it is thereby rendered unsafe and it becomes a nuisance, the only power the City has is to abate the nuisance and to impose fines upon parties who may create, continue or suffer nuisances to exist, and where a contractual relation, either direct or implied, exists, the City may recover the expense of abating a nuisance.

The question of the contract entered into between the Commissioner of Buildings and the so-called city wrecker, Charles C. Andersen, is very material in deciding whether or not these bills for wrecking the dangerous portions of buildings or structures should be paid by the City. I am informed by former Commissioner of Buildings Joseph Downey that at the time he commenced directing that the work of wrecking the dangerous portions of buildings be given to said Charles C. Andersen it was with the understanding between himself, acting as agent for the City, and said Andersen that said Andersen was to look to the owners of the property for his pay, and that when Commissioner Downey resigned and Commissioner Campbell was appointed as

his successor, Commissioner Campbell followed the custom established by Commissioner Downey in regard to the wrecking of buildings, giving the work to said Charles C. Andersen without any new or different understanding than that established by Commissioner Downey, and if this is true, in my opinion these bills for wrecking dangerous buildings should not be paid by the City until the amounts have been recovered by the City from the parties owing such bills.

Respectfully submitted,

WM. S. STAHL,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

FEBRUARY 15, 1909.

In re POWER OF CITY OF CHICAGO TO PREVENT THE DUMPING OF DREDGINGS BY U. S. GOVERNMENT CONTRACTORS WITHIN THREE MILES FROM THE SHORE.

HON. W. A. EVANS, Commissioner of Health, City of Chicago.

Dear Sir:

Your inquiry under date of February 8, as to "the rights of the City to prevent the dumping of dredgings at points within three miles from the shore, when the dredging so deposited is being done by contractors holding contracts for this work with the Engineering Division of the War Department of the United States Government," has been referred to me, and in reply I beg to say:

Section 13 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. L., 1152), is as follows:

"That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited, either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such

navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

In 1899 the direct question here involved arose when the City authorities of this City attempted to prevent the dumping of dredgings in Lake Michigan by United States Government contractors within eight miles of the shore in front of the City, under the provisions of a City ordinance forbidding such deposits. It seems that in proceeding under the authority of this ordinance several persons were arrested and the matter was brought to the attention of the Secretary of War, who requested the Attorney General of the United States to furnish an opinion upon the legality of the ordinance and the power of the City to enforce it.

In an opinion of considerable length, Attorney General John W. Griggs held:

"1. The authorities of the City of Chicago have no legal power to prohibit the Government contractors from dumping material dredged from the harbor at Chicago within the limits selected and designated by the Secretary of War, in accordance with the authority conferred upon him by law.

2. The power of the United States to regulate commerce

is general, absolute, and without limit, either as to the time, place, or detail of its exercise, except as to waters whose entire navigability for commerce is limited to the confines of a single State.

3. This power includes the right to regulate the use of all the means and instrumentalities used in commerce, whether on sea, river, harbor, or land, and entirely irrespective of whether a State has attempted to regulate the same matter or not.

4. Commerce is not restricted to the purchase, sale, and barter of commodities, but it includes navigation, intercourse, and the reception and transportation and delivery of passengers and freight by land and water, and also the means or instrumentalities used in such commerce.

5. Congress has power to regulate and improve the harbors of the navigable waters of the United States, and this carries with it the right to deposit the material removed in making the improvements in any other part of the harbor or navigable waters or other place within its control."

This opinion may be found in full in 22 Opinions of Attorneys General, 646. I have had copied and am sending you herewith that part of the opinion which is most strongly applicable to the case.

Section 4 of the Rivers and Harbors Act of March 3, 1905, is in part as follows:

"That the Secretary of War is hereby authorized and empowered to prescribe regulations to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings, earth, garbage, and other refuse materials of every kind or description, whenever in his judgment such regulations are required in the interest of navigation."

It seems, therefore, that Congress by the passage of these laws has placed the power and discretion as to the matter of such dumping by Government contractors in the Secretary of War, and that his authority to make rules and regulations is plenary. Congress, which has paramount power over the navigation and improvement of navigable waters in the interest of interstate commerce, has assumed control of the matter. This excludes all municipal or State regulation, even though such regulations may

be based upon the police power in the interests of the public health.

I am of the opinion that the City of Chicago has no power or authority to prevent the dumping of dredgings at points within three miles from the shore when such deposits are being made by contractors under contracts with the Engineering Division of the War Department of the United States Government.

Very respectfully yours,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 23, 1909.

TO THE HONORABLE, THE COMMITTEE ON BATHING BEACHES AND RECREATION PIERS OF THE CITY COUNCIL.

Gentlemen:

Under date of August 17, 1909, Hon. Theodore K. Long requested the Corporation Counsel to furnish a legal opinion covering several matters then pending before your committee, which request was subsequently assigned to me for consideration, and after some weeks of investigation and study of the various questions presented to your committee, I have the honor to advise you in the premises as follows:

1. As to jurisdiction over submerged lands.

By virtue of Section 71, Par. 10, of the Cities and Villages Act, the City of Chicago has jurisdiction upon all waters within or bordering upon the city to the extent of three miles beyond the city limits; that this Act did not grant to the City ownership of the submerged lands, is clearly shown by the case of *Bliss v. Ward,* 198 Ill., 104, in which the court said:

"The Act of 1863, reducing the charter of the City of Chicago to one act and extending the corporate limits of the City so as to include the waters and body of Lake Michigan for a distance of one mile east of the shore, did not transfer title to the submerged lands within such extended limits to the City of Chicago."

Of course, the court would doubtless, if the question were

presented, reach the same conclusion in considering the Cities, Towns and Villages Act (the Act of 1872), which superseded the City Charter of 1863, wherever the same was repugnant thereto or inconsistent therewith.

In many of the Illinois decisions, the title of the State in all of the submerged lands under Lake Michigan lying within the boundary limitations of Illinois, has been announced and affirmed.

"The law seems to be well settled in the different States that the title to and dominion over lands covered by tide-waters within the boundaries of the several States belongs to each State wherein they are located. The State holds the fee in trust for the public. The doctrine established in regard to lands covered by tide-waters, has also been held applicable to lands bounded by fresh water on our large lakes. As early as 1860 the question arose in this State in regard to the proper construction to be placed upon a deed conveying land with Lake Michigan as a boundary line, and in disposing of this question, this court, in *Seaman v. Smith*, 24 Ill., 521, held that a grant giving the ocean or a bay as the boundary line by the common law carries it down to the ordinary high-water mark; that the point at which the tide usually ebbs and flows is the boundary of a grant to the shore, and that the rule which governed in regard to lands on tide-water applied to lands on our great lakes. . . . The State holds the title in trust in its sovereign capacity for the entire people. . . . The governmental power of the State over these lands can not be relinquished or given away. The trust imposed upon the State must be kept and faithfully observed."

People v. Kirk, 162 Ill., 138.

2. As to the right of the State to transfer title in submerged lands.

Only in the subservience of public interests, as distinguished from private interests, can the alienation of submerged land in Lake Michigan be justified.

During the past twenty years numerous instances have arisen in which the State of Illinois, by its Legislature, has vested portions of the submerged land in various municipalities, and since a consideration of these transfers is necessary to a

proper understanding of the questions presented, it is pertinent to briefly mention some of the most important legislative enactments on this subject.

A. In 1889 the General Assembly authorized the Lincoln Park Board to extend a driveway over and upon the waters of Lake Michigan so long as the same did not interfere with navigation, commerce or the right of fishery. This Act also permitted the board to sell and convey the submerged land lying between the shore and the westerly boundary of the proposed driveway.

Our Supreme Court, in the case of *People v. Kirk* (*supra*), sustained the validity of the Act, and asserted that in transferring the submerged land within the limitations named in the Act, the Legislature had not transcended the trust imposed upon it by law.

B. Under the provisions of an Act passed by the Legislature, in force July 1, 1895, the Lincoln Park Commissioners were granted title to the submerged land from the Chicago river to the northern boundary of the Town of Lake View, upon the adoption of a plan for the enlargement of Lincoln Park and the location of a driveway over and upon the body of Lake Michigan. The Act also provided for a method of acquiring the riparian rights of the various shore owners. Subsequent to the passage of this Act, the Lincoln Park Commissioners have, from time to time, adopted plans for the construction of the boulevard or driveway from point to point along the north shore and have had the boundary line fixed by them, affirmed by a decree of the Circuit Court in conformity with the requirements of the Act.

Attached hereto and marked "Exhibit A" is a letter from Mr. Charles A. Churan, attorney for the Lincoln Park Commissioners, setting out in detail the progress of the Lincoln Park Commissioners in this matter to date; also a plat (Marked "Exhibit B") which shows the proposed extensions and work under construction in the Lincoln Park district.

Regardless of the fact that the Lincoln Park Commissioners had proceeded under the authority of the last mentioned Act, and had adopted a plan for the occupation and improvement of the submerged lands lying between the north line of Grace

street extended to the northern limits of the Town of Lake View, Charles U. Gordon attempted to construct a pier upon the submerged lands along the shore of Lake Michigan adjacent to Lot 13 of Simmons & Gordon's Addition to Chicago. The Supreme Court, in the case of *Gordon v. Winston,* 181 Ill., 338, in affirming the judgment of the Circuit Court enjoining the construction of the pier, held that the Park Board had a right to appropriate the submerged lands extending out to the line of navigation, and had the right to enjoin any acts on the part of Gordon which tended to encroach upon the public domain and gradually appropriate such property for his own use.

C. In the year 1899 the State granted to the City of Chicago the land under the waters of the lake opposite Thirty-ninth street for the purpose of building and forever maintaining thereon a pumping station, together with the necessary intakes for water with protecting piers therefor. (See Hurd's Revised Statutes, 1908, page 457.)

D. By virtue of an Act in force July 1, 1903, the South Park Commissioners were authorized to extend parks, boulevards or driveways bordering upon any public waters in this State, over and upon the bed of such public waters, provided that such extension should not interfere with the practical navigation of such public waters for the purpose of commerce, without due authority from the proper official of the United States Government having control thereof. The South Park Commissioners were also given the right to connect parks within their jurisdiction by constructing a boulevard, driveway or parkway over and upon the bed of such public waters and over and upon any lands penetrating such waters.

Provision was made in this Act for the acquisition of riparian rights, compensation to be made out of the *general revenue.*

E. Subsequent to the passage of the last mentioned Act, the commissioners discovered that its provisions were incomplete, and that a different method of payment for the riparian rights should be made; whereupon, during the summer of 1907, a new bill was presented to the Legislature which became a law on July 1, 1907.

As in the Act of 1903, the statute of 1907 transfers title to

the submerged land from Twelfth street to the north line of Jackson Park, when the Park Commissioners shall have acquired the riparian rights of the owners of any lands along the shore adjoining such submerged lands and shall have agreed upon a dividing line, which dividing line is established or affirmed by the decree of the Circuit Court.

It is to be noted that the acts granting the submerged lands along the north shore and the acts granting the submerged lands along the south shore to the various Park Commissioners differ materially in one respect, namely, the Lincoln Park Commissioners acquire the title upon the adoption of a plan for the extension; whereas, the South Park Commissioners acquire no title until the riparian rights have been secured.

My conclusion on this subject is concurred in by Mr. R. P. Hollett, who was attorney for the South Park Commissioners at the time the Act of 1907 was introduced in the Legislature, as well as by Mr. John G. Drennan, who assisted in the drafting of the bill.

In passing, it might be mentioned that during the last session of the General Assembly a bill was introduced and passed the Senate which granted the Chicago Exposition and Recreation Pier Company the right, power and authority to construct, maintain and operate a recreation pier upon the submerged lands in the waters of Lake Michigan extending easterly perpendicularly to the general trend of the shore of the lake to Thirty-first street, with proper and necessary approaches. The persons interested in this bill evidently also assumed that the South Park Commissioners had at the time of the introduction of the bill acquired no interest in the submerged land at this point.

My information is that the South Park Commissioners dropped the matter of extending a boulevard over the bed of the lake connecting Grant and Jackson Parks at the time when His Honor, Mayor Busse, appointed the Special Harbor Commission, since the park authorities had no desire to proceed with any scheme which would conflict with the plans of the City in the matter of the improvement of the lake front.

F. In 1903, the Legislature also granted and conveyed to the South Park Commissioners the submerged and artificially

made land lying within the "south boundary line of Jackson Park and the south line of Seventy-ninth street, as extended one thousand feet into Lake Michigan, and the line easterly of and parallel with the shore line of said lake" (and the shore line of said lake), and also within the "north line of Ninety-fifth street extended to its intersection with the boundary line of Indiana and Illinois, as extended, and the shore line of Lake Michigan."

3. Rights of riparian owners.

The Illinois courts have taken a severe stand in protecting the position of the State in the submerged land under the waters of Lake Michigan. The decisions bearing upon the rights of the shore owners are so clear and unequivocal that there can be no dispute as to the following propositions:

(a) The riparian owner has the right only to natural accretions and to access to the water in front of his property.

(b) The riparian owner may erect structures on his own land to protect it from erosion if they do not interfere with navigation, but he has no right to build piers or other structures upon the submerged land to accomplish that purpose unless authorized by the State. (*Revell v. People of the State of Illinois,* 177 Ill., 468.)

Revell, in this case, attempted to build a pier at right angles with the shore. This the court held was an unlawful and unwarranted act.

(c) The riparian owner has no right to construct a pier out into the lake unless he owns the submerged land, or has permission from one having title thereto. (*Cobb v. Commrs. Lincoln Park,* 202 Ill., 427.)

(d) Neither a riparian owner nor any other person can by filling in without permission obtain title to made land where the title to soil upon which the filling was done was in the State.

Farnham on Water Rights, Vol. 1, p. 339.

Diedrich v. Northwestern Union R. Co., 42 Wis., 248.

4. As to proposed Montrose avenue bathing beach.

On the thirteenth day of February, 1906, the commissioners of Lincoln Park, by resolution, adopted a plan showing lines running along the shore of Lake Michigan from the north line of Sheridan Road (Byron street), extended, to the north line of

Montrose avenue, extended, said line having been agreed upon as dividing or boundary line between the streets named above and the land acquired by the Commissioners of Lincoln Park under the aforesaid Act of 1895.

The Commissioners of Lincoln Park, by resolution, passed on the thirteenth day of January, 1909, duly resolved that it was the intention of the Commissioners of Lincoln Park in establishing said line to dedicate to the public as public streets Montrose avenue, Marquette terrace, Kenesaw terrace, Buena avenue, Gordon terrace, Bittersweet place and Irving Park avenue, as extended eastward to said permanent boundary line.

The City of Chicago, by ordinance duly passed on March 8, 1909, Council Proceedings, page 3172, accepted the aforesaid dedication.

Thus, there can be no controversy between the City and the Lincoln Park Commissioners as to the eastern boundary line of Montrose avenue. The City also owns the lot lying north of Montrose avenue (including the shore front and riparian rights) upon which is located the Lake View Pumping Station. This lot is 230 feet in width along the shore and the street is sixty-six feet in width.

The method of procedure which should be adopted prior to extending the pier into the lake at this point will be considered below.

5. As to the Twenty-second street beach and piers.

I am credibly informed that the Illinois Central Railroad Company has acquired all the riparian rights north of Fiftieth street and south of Twelfth street, excepting that portion of the lake shore which lies between the center line of Twenty-second street and a line produced into the lake from a point 160 feet south of Twenty-fifth street, which last-mentioned piece of land is part of the subject-matter of the committee's inquiry.

On July 27, 1852, the Illinois Central Railroad Company acquired from Stephen A. Douglas the property upon which is now located its right of way along the lake shore between the last-mentioned points, the deed expressly reserving in Douglas all title, right and ownership to land and water between the eastern line of said railroad and the center of Lake Michigan and bounded by due east lines drawn from the north and south

ends of said tracts of land. A copy of this deed is hereto attached and marked "Exhibit C."

Mary Morris Walker succeeded to all the interests of the late Stephen A. Douglas, and her heirs now claim to be the owners of this tract of land, a plat of which is hereto attached and marked "Exhibit D." The plat shows 2,240 feet of frontage of this piece of property. Inasmuch as the boundary of Twenty-second street is the west line of the right of way of the Illinois Central Railroad, the City could not contend it had any riparian rights in the submerged land easterly of the said company's right of way at this point, since contact with the water is necessary to the establishment of riparian rights.

On the question of method of procedure for the construction of a pier and filling in at this location, see below under heading "Procedure."

6. As to the situation at Fifty-first street.

The records of the Old Town of Hyde Park disclose that during the year 1871 a sewer was constructed extending into the lake at Fifty-first street, and a contract was awarded for the erection of a pier for the protection of the sewer.

This pier, I learned from witnesses—old residents of the vicinity—was from time to time extended eastward along the north line of Fifty-first street. The reports as to who extended the pier, running east and west into the lake, do not all agree. It is claimed by some that the Village of Hyde Park extended the pier, others assert that one James Morgan produced the result.

The records of the Map Department, as well as the reports of the old residents of the vicinity, do, however, coincide as to the location of the shore line of Lake Michigan at this point during the last thirty-five years. The plat hereto attached, marked "Exhibit E," shows the shore line in 1875 to have intersected Hyde Park boulevard (Fifty-first street) at a point about fifteen feet east of the east line of East End avenue.

Old residents remember when the waters at this point washed up on East End avenue and partially covered the northerly two hundred feet thereof. The present shore line at Fifty-first street is about 380 feet east of the east line of East End avenue, as shown on the two plats hereto attached and

marked "Exhibit F" and "Exhibit G," respectively. Practically all of the land which lies north of Fifty-first street and east of a pier running north and south extending from the east and west piers above referred to has been made within the last twenty-five years.

In 1882 the aforesaid James Morgan constructed this north and south pier, which, taken in connection with the east and west pier, forms an L-shape projection into the lake. Upon the construction of the north and south pier, the waves and wind from the north carried in vast quantities of sand which were deposited north of Fifty-first street; that Morgan himself made the greater part of this land can not be successfully denied. It is said that he would permit no fishermen, excepting those in his employ, to fish off the pier, nor would he allow any boat to land or tie up at this pier. Shortly after the construction of the pier, Morgan erected thereon a dredge and scooped the sand from the bottom of the lake outside the pier, and carrying it over the pier deposited it in the inside shallow water until, when his work was completed, the land extended out into the lake north from the east and west pier a distance of about 320 feet, as shown on the plat submitted. The excess sand he is said to have sold, the revenue therefrom amounting to as much as $100 a day, according to the reports of those familiar with the facts.

Under the law, this land which was made by filling in, as well as the land which was produced by the action of the waves in beating up against the L-shaped projection, could not become the property of James Morgan. What natural accretions were produced by the natural action of the wind and waves have been so commingled with the artificial accretions and made land as to become a part thereof, and, under the decisions above cited, the State of Illinois, undoubtedly, has become vested with all the land beyond the limitations of the boundaries defining Morgan's possession along Fifty-first street on the north side of Fifty-first street east of the west line of East End avenue extended.

7. As to the reclamation of submerged land known as "Morgan's Reef."

If the City were granted permission to fill in the lake from the shoal waters opposite Fifty-first street, the title to such land

would be vested in the City and the shore owner would have no claim or right thereto.

"An island arising in navigable water and afterward becoming joined to one shore belongs to the State and not to the owner of the shore, and the shore owner will have title only to such portion of the new land as was formed by accretions to his shore."

Farnham, Vol. 7, p. 276.

"If the process is such that an island first arises from the water and afterward becomes connected to the land by the addition of accretions to it, the title to the island will not vest in the riparian owner."

Farnham, Vol. 1, p. 323.

"Imperceptible accumulation of soil upon the shores of an island in the great lakes whereby it is enlarged belongs to the owner, but if the island first arises from the water and afterward becomes connected to that of the private proprietor it would not belong to him, but to the State."

People v. Warner, 116 Mich., 228.

"To entitle the riparian owner to the land, the water must begin to recede from his land. It is not sufficient if the recession begins at some other point and finally reaches his land."

Farnham, Vol. 1, p. 322.

The title of the shore owner is not established where it appears that as the waters receded they at first left islands separated from the land of the shore owner and from each other by squales or depressions in which the water remained for some time before the whole tract became dry."

Hammond v. Sheppard, 186 Ill., 235.

The riparian owner acquires only the natural accretions which are adjacent to and in contact with his shore boundary.

8. Power of the City to establish bathing beaches.

Section 6 of the Act of May 18, 1905, relating to the City of Chicago, empowers the City to acquire, by purchase or otherwise, municipal parks, playgrounds, public beaches and bathing places, and improve, equip, maintain and regulate the same.

Section 7 of said Act authorizes the City to exercise the

right of eminent domain by condemnation proceedings in conformity with the provisions of the Constitution and statutes of the State of Illinois for the acquirement of property useful, advantageous or desirable for municipal purposes, and the procedure in such cases, the statutes provide, shall be, as nearly as may be, like that provided for in the Act entitled "An Act Concerning Local Improvements," approved June 4, 1897, in force July 1, 1897, as now or hereafter from time to time amended.

It can not be successfully maintained but that the City if it secures permission from the proper authorities has the power to proceed with the establishment of bathing beaches and recreation piers as necessary adjuncts thereto.

PROCEDURE.

A.

Inasmuch as the Lincoln Park Commissioners unquestionably have title to the submerged land along the north shore from Byron street (now Sheridan Road), extended, to the north line of Montrose avenue, extended, their consent should be first had and obtained before any improvement is made at this point. In my opinion, legislative enactment in favor of the City would not be necessary for the construction of this pier.

B.

No work should be done by the City at Twenty-second street without permission (1) from the Government; (2) from the heirs of Mary Morris Walker; (3) from the South Park Commissioners; and (4) from the State of Illinois.

Notwithstanding what has been heretofore stated, I believe that the various park authorities should be consulted and their coöperation and permission secured, as a condition precedent to the construction of any pier in or over the submerged land.

C.

The City of Chicago should render all possible assistance to the State of Illinois in securing for the State possession of the made land, heretofore mentioned, north of Fifty-first street, and upon the State maintaining its title therein, permission of the Legislature, as well as of the South Park authorities, should

be obtained before any construction work or filling in is commenced at this point.

D.

Upon an understanding with the South Park Commissioners, a bill should be introduced in the Legislature by force of which the City would be authorized to fill in the shallows opposite Fifty-first street for park and recreation and bathing-beach purposes.

This land, when filled in, as well as the land proposed to be made by dumping at Twenty-second street, will, in the event permission is secured from the proper authorities for the doing of the contemplated work, unquestionably become the property of the City of Chicago.

But before any improvements in the nature of piers, the making of islands in the lake, or other obstructions are commenced, authority from the Secretary of War should be secured. Permission from the War Department for the construction of piers does not override the rights of the State in the submerged land, but, however, amounts to a declaration by the Government that the proposed structure will not interfere with navigation. (*Cobb v. Commrs. Lincoln Park, supra.*)

SUGGESTIONS.

I take the liberty of adding to this communication that the committee might well coöperate with the Special Park Commission in urging the next session of the General Assembly to authorize the City of Chicago to construct a pier at Seventy-ninth street, and to reclaim the large tract of submerged land, which, when reclaimed, will be an imposing addition, in the way of a park, to the present small bathing beach located just south of Seventy-ninth street.

I note, by the daily papers, that Alderman Jones proposes that the City should purchase the lake frontage from the south line of the South Shore Country Club property to Seventy-ninth street and should hold the same for bathing beach purposes.

In this connection I desire to call the attention of the committee to the aforementioned Act of 1903, turning over all the submerged land between the aforesaid points to the

South Park Commissioners. This board should be consulted before the City proceeds with this project.

The writer would be glad to attend the meeting of your committee and explain in detail any portion of this communication which may need elucidation or elaboration.

Respectfully submitted,

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 5, 1910.

In re CLAIM OF CHARLES DEUTSCHMANN.

HON. CHARLES M. FOELL, Chairman, Committee on Finance.

Dear Sir:

I am in receipt of your letter of the 14th inst., relating to the claim of Charles Deutschmann, wherein you request an opinion as to the City's liability on a claim for an improperly constructed sewer where the work has been accepted by the City Inspector, and as to the liability of the contractor's bond for imperfect work of this description. The enclosures, being a memorandum of the claim, a statement by J. C. Kotva to claimant for the work done and the letter of Hon. B. J. Mullaney to your committee, containing a statement of the facts, report and recommendation thereon, are received.

The facts as disclosed by the above letter and statement are that by virtue of a special assessment contract let by the City to Thomas D. Joy on *August 13, 1896,* warrant No. 21481, the latter constructed drains in St. Lawrence avenue, and among others a drain in front of No. 7403 St. Lawrence avenue; that such work was supervised by Inspector Frank Dushek; that on or about *January 25, 1910,* the sewer men dug up the entire front of the lot and were unable to find the drain; that they then opened the street and found the drain 12 feet outside the curb.

In writing this opinion, I have entirely disregarded the proposition that the laying of drains and connecting them with the sewer in the street, so that the owner of the property may use the sewer for the drainage of his sewage, is a matter of com-

fort, convenience and health to the property owner and his tenants, and not of any particular benefit to the City. On the other hand, I have based my opinion upon purely legal grounds.

While it may be said that it is the duty of the City to see to it that the work was done in conformity with the contract and ordinances, and that as a matter of fact it was inspected by the City, yet under the law the property owner owes himself the duty of exercising his legal rights when the work is done defectively, or is not in accordance with the contract and ordinances, and the failure by the property owner to exercise those rights estops him. It bars him from any recovery or remedy.

From the facts it appears that the property owner did not choose to exercise any of his rights and remedies in the premises. On the other hand, he stood by and silently acquiesced in the alleged defective completion of the contract.

When the work is done defectively or in any manner not in compliance with the terms and provisions of the contract and ordinance, seven separate and distinct remedies are provided by the law for the protection and relief of the property owner.

1. The aid of a writ of injunction might be invoked while the work is in progress.

Heinroth v. Kochersperger, 173 Ill., 205.

Fisher v. People, 157 Ill., 85.

People v. Green, 158 Ill., 594.

Callister v. Kochersperger, 168 Ill., 334.

2. Resort might be had to the writ of mandamus to compel the City to construct and complete the work in accordance with the specifications and conditions of the ordinance.

Heinroth v. Kochersperger, 173 Ill., 205.

Fisher v. People, 157 Ill., 85.

People v. Green, 158 Ill., 594.

Callister v. Kochersperger, 168 Ill., 334.

3. Objections might have been made by the property owner to the confirmation of the assessment if the objections arose prior to the date of the confirmation.

People v. Whidden, 191 Ill., 374.

Pells v. People, 159 Ill., 580.

4. Objections might have been interposed to the applica-

tion for judgment of sale of the land of the property owner for failure to pay the special assessment.

People v. Whidden, 191 Ill., 374.

Pells v. People, 159 Ill., 580.

5. An injunction might have been procured by the property owner restraining the City from improperly paying to the contractor the funds collected by virtue of the special assessment.

Heinroth v. Kochersperger, 173 Ill., 205.

6. An action on the case against the members of the Board of Local Improvements (personally) if the work alleged to be defectively performed was in furtherance of a conspiracy between them and the contractor to accept an inferior or defective performance of the contract.

Gage v. Springer, 210 Ill., 200.

7. Right of action on a bond of the contractor against the contractor and the sureties. It is said that a bond for the faithful performance of the improvement contract is for the benefit of property owners and on non-fulfillment of the contract the City may be compelled to collect the penalty of the bond and apply the funds to diminish the assessment.

Eno v. New York, 68 N. Y., 214.

And if the City be authorized to sue on such a bond, the parties for whose benefit it was made may bring suit in the name of the City without its consent.

Stephens v. Monmouth, 28 C. C. A., 292.

Assuming that the work under the contract was performed on or about August 13, 1896, then the Statute of Limitations has long since completely run against any and all remedies available to the property owner.

Since the property owner has been negligent in his duty to himself and did not avail himself of his rights which he might have asserted at the proper time and thereby protected himself and the City against the payment of the contract price, and since the Statute of Limitations has completely run against all causes of action which either the property owner, the City, or both, might have had against the contractor, either by injunction, mandamus or suit on the bond, I am of the opinion that this claim, at this time, that is, nearly fourteen years after the

performance of the contract, be disallowed. And as there is no legal liability on the part of the City, I respectfully recommend that such action be taken by your committee.

Respectfully submitted,
CHAS. G. HUTCHINSON,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

MARCH 30, 1909.

M. J. DOHERTY, ESQ., Superintendent of Streets.

Dear Sir:

The City Council has included in the appropriation for the current year an item of $2,000 "for lowering sidewalks on south side of Belden avenue from Sedgwick street to 180 feet east," C. P. 4069, of which we are informed about $500 is intended for the work of lowering the sidewalk and the balance for remodeling or repairing the buildings of abutting property owners, on the assumption that the city will be liable to such owners for the actual damages consequential to the change of grade. It has developed that so much of the above appropriation as contemplates the expenditure of city funds for the improvement of private property is the result of a misunderstanding of our attitude in the matter, and the question has been referred to me for investigation and report.

Records of the Building Department show that building permits for all houses fronting the 180 feet affected by the proposed improvement were taken out between March 6 and August 15, in the year 1883, and we are advised that the sidewalk in front of the whole 180 feet in question was constructed about the same time. These houses and the sidewalk in front of them were built with reference to the natural level of the land at that time, but it is a fact that the sidewalk was considerably above the grade already established by ordinance, as above indicated. Also that the parties building immediately east of said 180 feet in the same or the following year constructed their sidewalk in conformity with the established

grade, thus leaving a vertical drop in the sidewalk of about four feet.

It is understood that the owners of property abutting the sidewalk which it is proposed to lower contend, first, that the city is now estopped from changing the level of this walk; and, second, that if the change is made it will become liable to them for the damage resulting to their private property.

In the first place the charter power of the city to grade streets is one of which public policy as well as existing precedents require that the city should not be permitted to divest itself. As is said in *City of Bloomington v. Pollock*, 141 Ill. 346, at p. 349:

"By its charter the city of Bloomington is given power to alter, grade, pave, or otherwise improve its streets. Similar powers are given to probably all the cities in the State. Such powers are continuing powers, and are not exhausted by their first exercise."

In this respect it is believed that the power to grade is similar to the general police power which is defined as the power to make and enforce all regulations for "the comfort, safety, health, convenience, good order and welfare of the public" (*Wice v. C. & N. W. Ry. Co.*, 193 Ill. 351, p. 353), and of which the Supreme Court has said in *City of Chicago v. Union Traction Co.*, 199 Ill. 259, at p. 270:

"The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty."

Aside from the above considerations, however, the elements of an estoppel are lacking in this case. It is conceded that the doctrine of estoppel is applicable to municipal corporations and that they will be estopped or not as justice and right may require. *People v. City of Rock Island*, 215 Ill. 488, p. 495. But it is also true, as is said in *St. L. A. & T. H. R. R. Co. v. Belleville*, 122 Ill. 376, at p. 383, that

"It is of the essence of an estoppel in pais that the party having authority to act in the matter shall have knowingly

done an act to influence the conduct of the other, and that the other must have acted on the faith of that act."

In the present case it is claimed by the attorney for certain abutting owners that the city, by constructing curbs and sewers and erecting lamp-posts, has recognized the actual level of the sidewalk as the proper grade. But even if such circumstances could ordinarily have the effect claimed for them, these owners were clearly not entitled to place reliance on them, because at the time the sidewalk was laid there was in force a valid ordinance establishing the grade at a different level. The parties interested were charged with notice of this ordinance and bound by its terms. *Mather v. City of Ottawa,* 114 Ill. 659, p. 663. A decision directly in point is that of *Denver v. Vernia,* 9 Col. 399, which was a suit for damages to property caused by a change of grade and in which it was said, p. 407:

"The grade was fixed by the proper authorities long before the plaintiff's purchase of the property, although the street had not been lowered thereto. It was the plaintiff's duty to inquire of the proper city officers, before his purchase, what the change was . . . Especially was it his duty to ascertain the grade before erecting his improvement. To say in the face of the city ordinance above set out that he was justified in relying upon certain acts and appearances that the grade then existing was the fixed and permanent grade is a proposition that can not be entertained. He must be presumed to have known what the established grade was when he purchased, and to have purchased with reference thereto; he must also be presumed to have known what this grade was when he erected his improvements and to have built with reference thereto."

In regard to the length of time which has passed since the objectionable sidewalk was laid, it is well settled that mere lapse of time or inaction on the part of public officials for a long term of years are not sufficient to raise an estoppel against the city or create a prescriptive right with reference to a public street.

City of Sullivan v. Tichenor, 179 Ill. 97.

City of DeKalb v. Luney, 193 Ill. 185.

Entirely separate from the question of estoppel which merely involves whether the city may or may not lawfully change the grade, is the other question whether the making of the proposed change will result in liability for damages sustained by the property owner. In this connection it is submitted that there is a distinction to be made between the damages, if any, suffered by the land alone, and those sustained by the buildings. While no Illinois decision is found which is in point on this question, the general rule is announced in *Groff v. Philadelphia,* 150 Pa. St. 594, in which it is held that where a property owner erected a house on his lot after the confirmation of the plan fixing the grade of a street, he is restricted in his right to recover for injury done to his land alone by the grading of the street, and injury to his house is properly excluded. See also 27 Am. & Eng. Ency. Law, 2d Ed., p. 143, and cases cited.

The reasons for limiting the liability of the municipality in such a case to the damage inflicted on the land alone are clearly set forth in *Davis v. Mo. Pac. Ry. Co.*, 119 Mo. 180, in which the court say, at p. 188:

"Is a property owner entitled to consequential damages to his improvement thereon by reason of the city changing the street to a grade previously established? We think not. When the authorities of a city are of the opinion that the proper improvement of any of its streets may require that they should be graded, though the city may not at the time be in a condition to incur the expense, we think it would be entirely proper, in order to protect itself against *increased damage and cost*, that it should establish a grade to which subsequent improvement of adjacent property could be made to conform. If this is done and the grade so established is made a matter of record ascertainable by property owners, they should be bound by it."

To the same effect are:

Blair v. Charleston (W. Va.), 35 L. R. A. 852.
Denver v. Vernia, 9 Col. 399.
Crawford v. Delaware, 7 Ohio St. 459, p. 470.
Kuschke v. St. Paul, 45 Minn. 225.

Aside from the question of damage to the buildings it is undoubtedly true that the city will be liable for any damage which these property owners are able to show to their *land alone* as distinguished from improvements erected on the land without reference to a grade already established by ordinance. In *Bloomington v. Pollock*, 141 Ill. 346, at p. 351, this rule is stated as follows:

"We are unable to see any sound legal ground for a distinction between cases where the damage is done under an ordinance which changes the grade of a street and cases where the damage is done under an ordinance which for the first time establishes the grade."

So that if the parties interested are able to show injury to their lots without regard to that sustained by the improvements they will have a valid claim against the city to that extent, the measure of damages being the depreciation in market value. *Elgin v. Eaton*, 83 Ill. 535.

It may be objected that the sidewalk grade at this point is not the same now as it was in 1883 when the adjacent improvements were made, and that the city should therefore be held liable for damages caused by the proposed reductions to grade to the same extent as for any reëstablishment and fixing of a grade after improvements are already erected. It will be observed, however, from a comparison of the grades in force in 1883 and at the present time, that the net change is very slight, and that what there is inures to the benefit of the abutting owners in that the present grade is higher than the old one and therefore nearer the level at which they improved their property. Furthermore, these owners are not in a position to take advantage of the different grades established and then changed *since the construction of their improvements*, because those improvements were not constructed nor were any expenditures made in reliance on the grades thus changed. In other words, for any damage to be sustained by these property owners on account of the proposed reduction of the sidewalk, the proximate cause will be, not the adoption by the city of any new grade since 1883 or the change therefrom, but the failure of the parties themselves, when they built their houses

and laid their sidewalks, to conform to and observe the grade then in force.

For the above reasons it must be concluded that the city is at liberty to level this sidewalk to grade without incurring liability for the consequential damages to buildings on the abutting lots. Since this liability is lacking it is clear that so much of the $2,000 appropriation as was intended for the improvement of private property is unauthorized and can not be expended, on the familiar principle that city funds must be used wholly for corporate purposes and can not be diverted to private purposes. *People v. Parker,* 231 Ill. 478 and cases cited.

It is recommended, therefore, that you proceed under Section 2076 of the Revised Municipal Code of 1905, which is to the following effect:

"No part or portion of any sidewalk where the grade has been established shall be laid or relaid at any different grade or any other level than the adjacent portions of such sidewalks, and for every violation of this section there is hereby imposed upon the person violating the same a penalty of not less than five nor more than twenty dollars, and he shall also alter said sidewalk so as to make the same conform to the established grade, and in case he neglects and refuses so to do within a reasonable time, it shall be lawful for the department of public works to alter the same, and the costs and expense of the same shall be paid by such owner and may be recovered from him in an action in the name of the city."

Yours respectfully,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

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